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In The

SUPREME COURT OF THE UNITED STATES

LOWER BRULE SIOUX TRIBE

Petitioner,

vs.

STATE OF SOUTH DAKOTA

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

R. DENNIS ICKES
PARRY LAWRENCE & WARD
Attorneys for Petitioner
1270 Eagle Gate Tower
Salt Lake City, UT 84111
(801) 521-3434

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QUESTIONS PRESENTED FOR REVIEW

I. Should certiorari be granted to determine whether Congress may empower the State of South Dakota to exercise independent jurisdiction over recreational activities within the taken areas, including its jurisdiction over non-Indians and nonmembers?

II. Should certiorari be granted to clarify the Montana exceptions that are to be applied to activities of the general public within the taken areas within the Lower Brule Sioux Reservation that has not been opened under the homestead laws?

III. Should certiorari be granted to clarify the effects on the jurisdiction of the Tribe when an allotted Indian sells his or her lands to a non-Indian or a nonmember Indian within the exterior boundaries of the Reservation?

IV. Should certiorari be granted to clarify the circumstances when summary judgment is appropriate for Indian jurisdiction cases that must be decided by making particularized inquiries into numerous and complex facts?

PARTIES TO THE PROCEEDINGS

Parties to this case are: the State of South Dakota and John Cooper, Secretary, Division of Game, Fish and Parks for the State of South Dakota.

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Petitioner, Lower Brule Sioux Tribe, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit dated January 9, 1997, in Case No. 96-1692 is reported at 104 F.3d 1017 (8th Cir. 1997). The opinion appears in the Petitioner's Appendix to the Petition for Writ of Certiorari (Pet. App. A).

The opinion of the United States District Court for the District of South Dakota was entered on February 8, 1996, and is reported at 917 F.Supp. 1434 (D.S.D. 1996). The opinion appears in the Petitioner's Appendix to the Petition for Writ of Certiorari (Pet. App. B).

The suggestion for rehearing en banc and the petition for rehearing by the panel were denied on March 5, 1997. The statement appears in the Petitioner's Appendix to the Petition for Writ of Certiorari (Pet.App. C)

STATMENT OF JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. section 1254 (1). The judgement sought to be reviewed was entered on January 9, 1997, and the suggestion for rehearing en banc and the petition for releasing were denied on March 5, 1997. Judicial discretion to review is indicated at Rule 10(c).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND REGULATIONS INVOLVED

The Constitional provisions and statutes involved are listed below. The statutes appear as an Appendix to the Petition for Writ of Certiorari (Pet. App. D and E respectively).

Articles I, VI, and the Tenth Amendment to the United States Constitution

Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944)

STATEMENT OF THE CASE

Review is sought of the decision of the eighth circuit which affirmed the decision of the District Court for the District of South Dakota pursuant to 28 U.S.C. sections 158(d) and 1291.

The Lower Brule Sioux Tribe ("the Tribe") in 1991 sued the State of South Dakota and the Secretary of the state agency that regulates hunting, fishing and trapping within the State seeking to preliminarily and permanently enjoin it from asserting and enforcing its laws as against any person within the exterior boundaries of the Tribe's reservation. The Tribe's complaint also sought a declaratory judgment concerning the rights of the parties to enforce their respective laws within the exterior boundaries. Specifically, the Tribe sought a declaration that the State had no authority over hunting and fishing activities by any person anywhere within the exterior boundaries. Lower Brule Sioux Tribe v. State of South Dakota, 104 F.3d 1017, 1019 (8th Cir. 1997).

The Reservation was established as part of a March 2, 1889 act of Congress that divided the Great Sioux Nation into five smaller ones. 104 F.3d at 1020. The Reservation is bounded on the northeast and east by the Missouri River. The original area of the Reservation has been diminished twice by Congress: first in 1899 and second in 1906. 104 F.3d at 1020-1021.

The Tribe is organized pursuant to the Indian Reorganization Act of 1934, Act of June 18, 1934, 48 Stat. 984, (as amended by the Act of June 15, 1935 (Pub. L. No. 74-147)). The Tribe's 1983 census showed that 1,035 members of the Tribe's 1791 members resided on the Reservation. Approximately 10 percent of the residents of the Reservation are nonmembers, consisting principally of employees of the BIA, Indian Health Service, and nonmember ranchers living on the Reservation. Lower Brule Sioux Tribe v. State of South Dakota, 917 F.Supp. 1434, 1440-41, affirmed 104 F.3d 1017 (8th Cir. 1997).

Approximately 235,800 acres remained within the Reservation after the diminishment acts of 1899 and 1906. At the time that the Reservation was created all land within its boundaries were held in trust by the United States for the Indians. 25 Stat. 889 (1889). After 1889 no nonmember of the Tribe could acquire land within the Reservation except under the authority of Congress. Congress authorized the issuance of fee patents to individual tribal members who in turn in some instances sold their land to nonmembers of the Tribe. Since 1906 approximately one-quarter of the Reservation, 56,634 acres, passed into fee ownership as a result of the allotment process. 917 F.Supp. at 1441. Piecemeal sales of fee lands up to the time of the Indian Reorganization Act of 1934 created a "checkerboard" map of trust lands, tribal lands, allotted lands, and fee lands. 104 F.3d at 1021.

Other lands within the Reservation consist of tribal trust lands, allotted lands held by tribal members and Government lands held for Indian use. Id. In addition, there are lands which Congress, as part of a comprehensive flood control plan

for the Missouri River authorized by the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (1944) took (22,296 acres) for allocation between two dams and reservoirs. 104 F.3d at 1021. The boundaries between the lands within the Reservation are not marked making it difficult for persons to distinguish the ownership of these classes of lands. Furthermore, the wildlife herds migrate from and across all of these lands, thereby creating problems for law enforcement. Id. The Tribe has had an active program to reacquire lands within the Reservation that have gone out of trust as a result of the allotments acts. See State of South Dakota v. U. S. Dept. Of Interior, 69 F.3d 878 (8th Cir. 1995), vacated and remanded 117 S.Ct. 286 (1997).

In 1961 the Tribe adopted a wildlife management code that required nonmembers to abide by its regulations, as well as the laws of the State. 917 F.Supp. at 1442. In 1982, the Tribe adopted an extensive wildlife code that asserted regulatory authority over all wildlife within the Reservation to the exclusion of the State's laws. Id. On occasion, the Tribe and the State's wildlife laws have conflicted. The Tribe's wildlife program is extensively supported by the Bureau of Indian Affairs. De minimis amount of State revenues have been utilized by the State for management and enhancement of wildlife programs on the Reservation, although the State has invested a considerable amount of time and interest in implementing the funds provided by the federal government. 917 F.Supp. at 1451. Nonetheless, the Tribe has not traditionally accommodated itself to the State's regulation of hunting and fishing on fee lands within the Reservation. 917 F.Supp. 1449.

The Tribe has actively and aggressively attempted to develop recreational opportunities from its wildlife assets. These efforts have generated substantial year-round revenues and has produced significant Reservation activity. Such programs have consisted of wildlife harvesting, wildlife viewing, living history reenactments, commercial buffalo operations, marina, and arts and crafts. Id. Both the Tribe and the State have sought to derive income from non-Indians and nonmember Indians through fees and licenses arising from hunting and fishing on the fee lands and the taken lands. 917 F.Supp. 1442-43.

ARGUMENT

Jurisdiction in Indian country is critical to the survival of Indian tribes. Loss of jurisdiction is an economic loss as well as a loss of a right of government to regulate affairs that affect its territory and its people. Tribal authority over the activities of non-Indians on reservation lands is an important part of Tribal sovereignty. See Montana v. United States, 450 U.S. 544, 565-566, 101 S.Ct. 1245 [1258-1259], 67 L.Ed. 493 (1981).

Proper development of the law within the boundaries of the Lower Brule Sioux Indian Reservation concerning jurisdiction requires that the Supreme Court answer the questions posed by the case. The questions posed by the Petition concern tribal jurisdiction in two types of land situations. The first set of questions concern whether the opening of lands taken for dam and reservoir purposes for public recreational use was intended to both remove

jurisdiction from the Tribe and concurrently confer jurisdiction upon the State over nonmembers. This set of questions must also answer under what circumstances does the Tribe possess jurisdiction over nonmember conduct within the taken area. South Dakota v. Bourland 508 U.S. 679, 113 S.Ct. 2309, 124 L. Ed. 2d 606 (1993), did not reach the question of whether the state possessed jurisdiction when it was found that the Cheyenne River Sioux Tribe did not have jurisdiction over hunting and fishing within the taken area and left uncertain the circumstances where tribal jurisdiction was applicable within the taken area over nonmembers.

This Petition also poses questions concerning whether the sale by allotted Indians to non-Indians and to nonmember Indians during the Allotment Act period had the effect of opening the Reservation to the application of state law on deeded lands under the facts of the case.

Finally, the Petition questions whether summary judgment is proper when the issues for decision concern matters that require extensive findings of fact, some of which are either not capable of being developed as a practical matter during the discovery phase but are intended to more fully developed at the trial.

I.

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER CONGRESS MAY EMPOWER THE STATE OF SOUTH DAKOTA TO EXERCISE INDEPENDENT JURISDICTION OVER RECREATIONAL ACTIVITIES WITHIN THE TAKEN AREAS, INCLUDING ITS JURISDICTION OVER NON-INDIANS AND NONMEMBERS.

In South Dakota v. Bourland, 508 U.S. 679, 113 S.Ct. 2309, 124 L.Ed.2d 606 (1993), rev'g, 949 F.2d 984 (8th Cir.1991), the Supreme Court declined to address whether South Dakota had regulatory jurisdiction over hunting and fishing in the taken area for the reason that the State had only sought a judicial determination regarding the Tribe's claim to regulatory jurisdiction. Bourland, 508 U. S., at 691, n.12. 113 S.Ct., at 2318, n.12 This Petition presents this Court with the opportunity to resolve this publicly important issue on the Lower Brule Reservation.

The Court in Bourland concluded that Congress gave the Army Corps of Engineers, not the Tribe, regulatory control over the taken area. 508 U.S., at 589-590, 113 S.Ct., at 2317. The circuit court applied this legal principal in the instant case but took the additional step of answering the question concerning the authority of the State in the taken area that the Supreme Court had refrained from addressing in Bourland. The circuit court then ipso facto held that the Corps also has the authority to entrust the State with regulatory authority of hunting and fishing by non-Indians and nonmember Indians in the taken areas. Lower Brule Sioux Tribe v. State of South Dakota, 104 F.3d at 1025. Neither

the district court nor the circuit court's conclusion is supported by court precedent. Whether Congress could constitutionally grant to an agency of the Executive Branch authority to confer upon the State a power that the Constitution did not reserve to the State has not been addressed heretofore by this Court in the context of a congressional taking of land for a federal purpose from an Indian Tribe.

The Bourland Court looked to the 1944 Flood Control Act as the foundation for the enactment of the taking acts that took lands from the Indian reservations along the Missouri River. That Act conferred powers upon the Secretary of the Army and other federal agencies and departments to exercise "jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control". Respectfully, Congress directed the federal departments to recognize the interests and rights of the States in water utilization and control. 58 Stat. 887, section 1. Presumptively, these interests and rights pertained to the diversion and consumptive uses of water. The Chief of Engineers for the Corps of Engineers was authorized to construct, maintain and operate public park and recreational facilities in reservoir areas. Id. at section 4. The Chief of Engineers was directed to give a preference to federal, state and local governments that desired licenses to construct, maintain and operate park facilities on such lands when the Secretary believed such facilities to be in the public interest. However, [n]o use of any area . . . shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated." Id. at section 4. The extensive interest of the federal government in the taken area was acknowledged in ETSI Pipeline Project v. Missouri, 484 U.S. 495, 108 S.Ct. 805, 98 L.Ed.2d 898 (1988).

The 1944 Flood Control Act did not confer any powers upon the States. The Bourland Court did not find that the 1944 Flood Control Act directly delegated to the States the authority to regulate taken lands and the Court did not find that the States possessed such authority under the Tenth Amendment to the Constitution. The case being petitioned squarely raises the issue. The Act recognized the rights of the States to appropriate water (section 1), extended a preference to States to obtain licenses to construct, maintain and operate public parks and recreational facilities on taken lands (section 4), and respected State enacted fish and game laws by requiring federal regulations to be consistent with these laws (section 4). However, Congress did not delegate its power over the taken areas to the State, and it could not constitutionally do so.

Congress's power over the Missouri River and over the Indian tribes that live beside it is extensive. Congress's power arises under the Commerce Clause Art.I, section 8, cl. 3), the Spending Clause (Art. I, section 8, cl.1), the Necessary and Proper Clause (Art. I, section 8, cl. 18), the Supremacy Clause (Art. VI, cl. 2), among others.

The Constitution provides at Article I, section 1 that "All legislative Powers herein granted shall be vested in a Congress of the United States." From this language the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government. Touby v. United States, 500 U.S. 160 (1991). The Corps' purported delegation of regulatory power over nonmember and non-Indian hunting and fishing to the State also begs the question of whether Congress has been delegated power by the Constitution to permit an Executive

Branch agency in turn to delegate to a State a power that Congress did not itself grant.

Inherent in the question concerning Congress's power or the State's power in the matter is whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States. New York v. United States, 505 U.S. 144, 155, 112 S.Ct. 2408, 2417 (1992). The power at issue here is the power to control the activities of non-Indians and nonmembers within an area partially taken from an Indian tribe by Congress for a national program for navigation, flood control and other purposes in large river basins.

The principal motivations for the enactment of the Flood Control Act of 1944, 58 Stat. 887, Pub.L. No. 534 (1944) was to resolve the severe flooding of the Missouri River Basin throughout the first portion of the Twentieth Century. H.Rep. No. 1309, 78th Cong. 2d Sess., 1350-51. Concurrent with the need to control the Nation's river basins, Congress foresaw the opportunity to enhance public recreation. Section four of that Act authorized the Secretary of War to construct, maintain, and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit third parties to construct, maintain, and operate such facilities. The Secretary of War was also authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he may deem reasonable. As noted by the Court in Bourland, "all such projects shall be open to public use generally" for various "recreational purposes, . . . when such use is determined by the Secretary of the Army not to be contrary to

the public interest, all under such rules and regulations as the Secretary of the Army may deem necessary." 508 U.S., at 689, 113 S.Ct., at 2317.

If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. New York v. United States, 505 U.S. 144, 156, 112 S.Ct. 2409, 2418, citing United States v. Oregon, 366 U.S. 643, 649, 81 S.Ct. 1278, 1281, 6 L.Ed.2d 575 (1961) and other cases. The Tenth Amendment thus directs us to determine whether an incident of state sovereignty is protected by a limitation on an Article I power. 505 U.S. at 157, 112 S.Ct. at 2418.

Congress may not commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288, 101 S.Ct. 2352, 2366, 69 L.Ed.2d 1(1981). However, where federal regulation of private activity is within the scope of the Commerce Clause, the Court has recognized the ability of Congress to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation. Id., 452 U.S., at 288, 101 S.Ct., at 2366. Nonetheless, "[w]here Congress exceeds its authority relative to the States . . . the departure from the constitutional plan cannot be ratified by the 'consent' of state officials." New York v. United States, 505 U.S., at 181, 112 S.Ct., at 2431.

The 1944 Flood Control Act did not and could not confer powers over navigation upon the States that Congress alone possessed. Congress could not constitutionally confer powers upon the States that are created in the Congress by the Constitution, even if the States agreed to the transfer.

II.

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE MONTANA EXCEPTIONS THAT ARE TO BE APPLIED TO ACTIVITIES OF THE GENERAL PUBLIC WITHIN THE TAKEN AREAS WITHIN THE LOWER BRULE SIOUX RESERVATION.

The requirements of Section 4 of the Flood Control Act provide that the public has "ready access to and exit from such water areas along the shores of such reservoirs [which] shall be maintained for general public use." The Big Bend Taking Act, 76 Stat. 698, Pub. L. No. 87-734 (1962), at section 10 and the Fort Randall Taking Act, 72 Stat. 1773, Pub. L. No. 85-923 (1958) at section 5 acknowledges the Secretary of the Army's regulatory authority governing "the corresponding use by other citizens of the United States" within the taken area. To be consistent with the Court's holding in Bourland that Congress intended to permit the public to access the taken area within the Reservation the taking acts must also implicitly either permit the public to access the taken area from any point the Secretary of the Army authorizes or from any point the public chooses. The Bourland Court did not determine whether the Cheyenne River Sioux Tribe could regulate the terms and conditions of such ingress and egress or whether it could regulate the impacts from the taken area onto trust lands or onto fee lands. Nonetheless, in either case the interests of the Tribe and its

members are clearly subject to being affected by the acts of the general public in exercising its statutory right of ingress and egress..

There is no precedent established by this Court that directly deals with the aforementioned circumstance. The interest of the general public in the taken area must be balanced against the interest of the Tribe and its members on adjacent trust lands and as to impacts generated from Corps administered lands onto those trust lands. Certiorari should be granted to resolve this important public issue.

III.

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE EFFECTS ON THE JURISDICTION OF THE TRIBE WHEN AN ALLOTTED INDIAN SELLS HIS OR HER LANDS TO A NON-INDIAN OR A NONMEMBER INDIAN WITHIN THE EXTERIOR BOUNDARIES OF THE RESERVATION THAT HAS NOT BEEN OPENED UNDER THE HOMESTEAD LAWS.

In Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 109 S.Ct. 2994, 106 L.Ed.2d 343 (1989) the Court observed that the Yakima Reservation had been divided by the Tribe into two parts or communities. The federal District Court described one area as "closed" and the other area as "open". That Court noted that the "closed area" was "restricted", "closed to the general public", "pristine", "uninhabited", an "undeveloped refuge", and "wilderness-like". The distinctions of "open" and "closed" took on importance again in Bourland even though Justice Stevens in Brendale deemed these terms to be

irrelevant to his analysis. 492 U.S., at 438, n.2, 109 S.Ct., at 3012, n.2. The Bourland Court noted that "regardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." 508 U.S., at 692, 113 S.Ct., at 2318. Agreeing that Bourland substantially controlled Lower Brule, 104 F.3d, at 1019, the circuit court's decision has created substantial uncertainty in determining the application of law within the lands outside of the taken area. The Supreme Court's review of the effects of allotted lands passing into deeded ownership will promote the administration of government within the Reservation.

The Court in Brendale and Bourland characterized reservation lands as "open" or "closed". In Brendale the "closed area" was a portion of the reservation to which the tribal council had restricted access. 492 U.S., at 438, 109 S.Ct., at 3012. The "open area" was that portion of the reservation where the tribe made no attempt to control access. 492 U.S., at 445, 109 S.Ct., at 3015. The Court cited the trial court record that found that nonmembers could move freely around the area on roads constructed by the county and that the area was marked by residential and commercial developments. Residents within the open area were primarily nonmembers, residents voted in local and state elections, government services were provided by local government, almost half of the land was owned in fee, incorporated towns occupied portions of the area, agricultural use by nonmembers was dominant, the character of the area was non-Indian and integrated into the majority society, and that the area lacked unique religious or spiritual significance to the tribe. Based upon these characterizations six members of the Court treated

the "open area" as being subject to local governmental control and the "closed area" as being subject to tribal control for zoning purposes.

The Bourland Court analogized that the lands taken for dam and reservoir purposes and used for recreational purposes pursuant to the Flood Control Act and the Cheyenne River Acts were equivalent to lands that had been "opened" for non-Indian homesteading by acts of Congress in Montana 508 U.S., at 691, 113 S.Ct. 2318. The effect of the Bourland decision was to deem the taken area portion of the Cheyenne River Sioux Reservation an "open area" which was thus open to use by nonmembers subject to the regulation of the federal government and outside of the regulatory authority of the tribe.

Brendale and Bourland together seemingly move the federal common law on tribal jurisdiction toward these characterizations of "open" and "closed" in a way that creates even more uncertainty for residents of the Reservation. Whether an area or a reservation in its entirety is "open",and thus subject to having the deeded lands under state jurisdiction, seems dependent upon whether any portion of the reservation has deeded land arising from the General Allotment Act and its progeny. This appears the law so long as the percentage of non-Indian ownership is more than de minimis, whether the land owners are residents, how the deeded land are dispersed among Indian trust lands, the percentages of Indian to non-Indian residents on the reservation, the sources of wildlife, the sources of government services, and the like.

Even though a reservation has been opened to settlement does not necessarily mean the opened area has lost its

reservation status. Mattz v. Arnett, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed. 2d 92 (1973); Seymour v. Superintendent, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962). Likewise, it could be said that the reservation does not necessarily lose its Indian character when it has been opened by homesteading or by an congressional taking for dam and reservoir purposes.

Under previous standards established by the Court concerning the opening of a reservation the Lower Brule Reservation would not be considered an "open reservation." The surplus land acts that declared unallotted Indian land as surplus to the needs of the Indians were the congressional vehicles that diminished the exterior boundaries of the reservation so as to end tribal jurisdiction over non-Indians within the "opened" portions of the Reservation. See Solem v. Bartlett, 465 U.S. 463 (1984); Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), DeCoteau v. District County Court, 420 U.S. 425 (1975). The Lower Brule Reservation has never been opened to homesteading after being diminished in 1906.

The Lower Brule Reservation has been diminished twice since 1889. The Act of March 3, 1899 30 Stat. 1362 diminished the Reservation by 120,000 acres to provide land on the Rosebud Reservation for Lower Brule Indians who desired to relocate there. The Act of April 21, 1906 34 Stat. 124 removed the west end of the Reservation. The federal government sold these lands under the homestead laws. The remainder of the original reservation was occupied exclusively by Lower Brule Indians until allotted lands began to pass title to non-Indians.

Between 1906 and 1934 allotments were made to Indians. When some of these allotments matured into fee patents some of the Indians conveyed their interests to non-Indians and nonmember Indians in fee. Lower Brule Sioux Tribe v. State of South Dakota, 104 F.3d, at 1021. As a result, approximately 25 percent of the current day reservation is deeded land. Lower Brule Sioux Tribe v. South Dakota, 917 F.Supp., at 1441. The Tribe has an aggressive land purchasing program to in effect buy back the lands that passed into nonmember ownership.

Jurisdiction over deeded land will remain a source of continued conflict between the State and the Tribe until the criteria for determining jurisdiction is clarified. The instant case presents the issues in a way that the Court may clarify its earlier pronouncements.

IV.

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE CIRCUMSTANCES WHEN SUMMARY JUDGMENT IS APPROPRIATE FOR CASES THAT MUST BE DECIDED BY MAKING PARTICULARIZED INQUIRIES INTO NUMEROUS AND COMPLEX FACTS.

In the trilogy of cases decided in 1986, Celotex Corp. V. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d (1986), Anderson v. Liberty Lobby, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986), and Matsushita Electric Industrial Co.v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), the Court considered the appropriateness of summary judgment in several contexts. None of these

cases, or any since, have considered whether summary judgment is appropriate in cases involving the determination of jurisdiction in Indian country where jurisdiction is based upon the complex mix of relevant facts.

The status of the law concerning summary judgment as espoused in Kennedy v. Silas Mason Co., 334 U.S. 249 (1948) needs to be examined in the context of Indian jurisdiction. In Silas Mason the Supreme Court did not dispute that the lower court had enough evidence before it to justify the summary judgment procedure. Nonetheless, that court overturned the lower court's summary judgment because it concluded that the case presented issues of far flung importance. The Court noted that no matter how salutary or clear-cut and simple were the issues, the summary judgment procedure presented a "treacherous record" for deciding such issues. The Kennedy court went on to say, "While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of the judicial process to provide." Such is the situation in the case that was presented to the circuit court.

Determinations of questions of jurisdiction within Indian country require an extensive fact finding inquiry. In Montana v. United States, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981) the Court reviewed the trial record and the appellate record to arrive at its conclusion. The trial process established the reservation land ownership, the pattern of ownership within the reservation, the source of land ownership title by nonmembers, the population, the nature and extent of the activities conducted by the state, tribal and federal entities within the reservation, the actions taken by the tribe with

respect to hunting and fishing within the reservation, the nature of the actions taken by the tribe with respect to nonmembers' hunting and fishing there, the legal status of the river bed and banks, the nature of contractual relations between the tribe or its members and nonmembers, the nature and degree of the activities of nonmembers within the reservation insofar as those activities affect Indian interests, the history of the relationships between the tribe and the state regarding hunting and fishing by nonmembers within the reservation, and the like.

The Court in Brendale also reviewed trial and appellate records to ascertain extensive facts that were developed by the trial record. Such factual development included an examination of the land ownership within the reservation, the legal sources for title to lands owned by nonmembers, the degree and pattern of nonmember ownership, the demographics of the reservation, the presence and demographics of incorporated towns, the location of Indian residences vis a vis nonmember residences, whether communities have Indian characteristics, the relationships between the tribe and its members with nonmembers arising out of land ownership, the circumstances existing as to activities by nonmembers as those activities may threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the tribe, the nature and degree of the regulatory authority exercised by the state and local governments, whether any portion of the reservation was classifiable as "open" or "closed", and similar such facts developed in the give and take of the trial process.

Likewise, South Dakota v. Bourland, supra, was a review of a six day trial where twenty witnesses were heard and 267

exhibits were reviewed. South Dakota v. Bourland, Civ. No. 88-3049 (D.S.D. Aug. 21, 1990). The process determined the history of tribal and state game and fish enforcement within the reservation and the taken area, the nature of enforcement by the tribe, the nature and degree of the activities conducted by nonmembers within the reservation, the laws that the tribe had in effect, the reliance that members had on fish and game produced within the reservation for food, religious worship, social and cultural uses, uses of lands by wildlife, the nature and degree of federal assistance, the demographics of the reservation, the sources of nonmember title to lands, the pattern of land ownership, whether any portion of the reservation was classifiable as "open" or "closed", the impacts that nonmembers had upon the tribe and its members when the taken lands were used, the sources of certain wildlife, the qualifications of tribal wildlife officials to administer wildlife programs, tribal and member uses of wildlife, revenues produced from wildlife activities, the Indian character of the questioned lands, and the like.

In the case presented by this petition the district court, over the protestations of the Tribe, denied to the Tribe the thoroughness of a trial, even though the facts already developed and the facts to be developed at trial, had been offered in opposition to the State's motion for summary judgment. The appeals court failed to address the uniquely factually complex nature of the instant case or cases of this nature where determinations of land ownership, land use, sources for wildlife sustenance, nature and extent of activities by members and nonmembers, contractual relations between the tribe or its members and nonmembers, the nature of the activities by the State, the pattern of use of various land types by wildlife, the reliance that the tribe places upon wildlife

related activities as a source of revenues for the tribe, the reliance that members place upon wildlife as a source of food, culture, religion and social uses, and other facts that had not been fully developed by the trial process.

This Court has frequently acknowledged that in assessing jurisdiction within an Indian reservation requires a "particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law. White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980). Yet, neither of the lower courts gave to the Tribe the full opportunity to present those facts in a forum where they are best tested.

The eighth circuit several decades earlier concluded that summary judgment should not be awarded except when the moving party is entitled to it beyond all doubt and when there are no discernible circumstances where the non-moving party could defeat the motion. Summary judgment is an extreme remedy that should only be awarded when all reasonable doubts touching the existence of a genuine issue of a material fact are resolved against the non-moving party. Traylor v. Black, Sivalls & Bryson, 189 F.2d 213, 216 (8th Cir. 1951).

It is readily conceivable that at a trial on the merits that the Tribe could prove that indeed the regulation of nonmember fee lands within the Reservation could impermissibly impact the political, economic, social, health and welfare interests of the Tribe and its members within the meaning of Montana's second exception. The Tribe clearly proffered facts that would support such findings after a trial, including facts pertaining to the Indian character of the Reservation, the pattern of land use in relation to nonmember ownership

patterns, the migratory habits of wildlife, the value of wildlife harvesting licenses to the Tribe, the value of non-consumptive uses of wildlife to the Tribe and how the Tribe's non-consumptive uses are adversely affected by nonmembers and the State, the value of subsistence hunting and fishing to Tribal members, the level of federal support for wildlife within the Reservation, the relative habitat support that trust lands provide to animals harvested within the Reservation, the effects that State enforcement in certain areas would have upon the Tribe's most hunter-attractive hunting areas, the effects of dual jurisdiction within a logical hunting unit, the adverse consequences of the lack of boundaries between the Corps taken area and the trust lands, and the like. The interests of justice require that the Tribe be given that opportunity.

The eighth circuit opinion noted that its holding does not preclude the Tribe from seeking relief against the State in the future if the State's conduct can be shown to infringe upon the political integrity, economic security, or health or welfare of the Tribe as a whole. 104 F.3d at 1024. This conclusion is significantly important because it is premised upon the majority's perception that the Tribe did not offer sufficiently material contested facts to defeat the subject motion for summary judgment.

Implicit in this holding is the invitation to the Tribe to reinstate its claims in new litigation with better supported facts that the State has or is engaging in conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." Judicial economy would be furthered if the current dispute was submitted to a trial on the current merits. Unless the present dispute is resolved by a trial future disputes will also be

complicated with additional issues concerning res judicata. The opportunity to minimize future litigation in the federal courts exists by litigating the facts and issues presented to the trial court in the Tribe's complaint.

Determining jurisdiction within an Indian reservation is similar to determining conspiracy in antitrust cases where determinations of illegal activity causing harm to a protected party requires extensive factual findings that make such cases less susceptible to summary judgment. A trial on the merits in jurisdiction cases that are fact specific will advance the public's best interest. A trial will provide the parties with the opportunity to submit to the trier of fact all of their relevant evidence in the appropriate factual context. A decision of the trial court on all the facts, and any subsequent appeal would, as a practical matter, end the likelihood of ongoing litigation over these issues so that the public's understanding of the jurisdictional status within the Reservation will not be in a state of flux.

CONCLUSION

The granting of certiorari will advance the proper development of the law concerning jurisdiction by federal, tribal, and state governments over territory and persons within the Lower Brule Reservation.

Respectfully submitted,

R. Dennis Ickes
Counsel of Record
Attorney for Petitioner
1270 Eagle Gate Tower
Salt Lake City, UT 84111
(801) 521-3434

Dated this 2nd day of June 1997.

APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED JANUARY 9, 1997

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-1692

Lower Brule Sioux Tribe;	)	
	)	Appeal from the United
Appellant;	)	States District Court
	)	for the District of
v.	)	South Dakota
	)	
State of South Dakota;	)	
John Cooper, Secretary,	)	
Division of Game, Fish &	)	
Parks for the State of South	)	
Dakota;	)	

Appellees.

Submitted: October 24, 1996
Filed: January 9, 1997

Before BOWMAN, HEANEY, and BEAM, Circuit Judges.

HEANEY, Circuit Judge.

This case involves a long-standing dispute between the Lower Brule Sioux Tribe ("Tribe") and the State of South

Dakota and the Secretary of the State Game, Fish & Parks Division ("State") concerning regulatory jurisdiction over hunting and fishing by nonmembers of the Tribe on nonmember-owned fee lands and waters and taken areas within the boundaries of the Lower Brule Sioux Reservation ("Reservation"). The Tribe brought this action to enjoin the State from enforcing its hunting and fishing laws over any person within the boundaries of the Reservation. The Tribe also sought declaratory relief that the State is barred from exercising any regulatory authority over hunting or fishing within the Reservation. Since this litigation began in 1980, the Supreme Court has handed down several important decisions relating to Indian sovereignty and tribal regulatory authority on different land classifications within Reservation boundaries. Accordingly, the district court determined that this action is substantially controlled by South Dakota v. Bourland ("Bourland III"), 508 U.S. 679 (1993), rev'g, 949 F.2d 984 (8th Cir. 1991), Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (plurality), and Montana v. United States, 450 U.S. 544 (1981). Following this line of authority, the district court granted the State's motion for summary judgment. We agree that this result follows Supreme Court precedent and affirm.

This case began over sixteen years ago when the Tribe sought to enjoin the State from enforcing its fish and wildlife regulations on fee lands and taken lands within the boundaries of the Reservation and to obtain a declaratory judgment that the Tribe has exclusive regulatory jurisdiction over hunting and fishing by any person within Reservation boundaries. In the first phase of the litigation, the district court reserved ruling on matters pertaining to fee lands. With respect to lands taken by the Army Corps of Engineers for flood control projects at Fort Randall and Big Bend, the court held that the respective taking acts diminished the Reservation thereby divesting the Tribe of jurisdiction over even tribal members on those lands. Lower Brule Sioux Tribe v. South Dakota t"Lower Brule I"), 540 F. Supp. 276, 292 (D.S.D. 1982). Our

court reversed, holding that the Tribe had exclusive jurisdiction to regulate hunting and fishing by tribal members in the taken areas and remanding for reconsideration of who has jurisdiction to regulate hunting and fishing by nonmembers within the Fort Randall and Big Bend taken areas. Lower Brule Sioux Tribe v. South Dakota ("Lower Brule II"), 711 F.2d 809, 813, 827 (8th Cir. 1983). Before trial, however, the Tribe and the State entered into a five-year cooperation agreement. Unfortunately, this agreement was not renewed; and when it expired on October 24, 1991, the Tribe brought this action to enjoin the State from enforcing its hunting and fishing laws over any person on fee lands and taken lands within the boundaries of the Reservation and to bar the State from attempting to regulate hunting and fishing on those lands in the future. The district court entered a preliminary injunction against the State on November 13, 1991, in effect, continuing the terms of the expired five-year agreement between the parties. After extensive discovery by both sides, the State filed a motion for summary judgment on September 11, 1995. On February 8, 1996, after the Tribe filed its second response to the motion, he district court granted the State's motion for summary judgment. Lower Brule Sioux Tribe v. South Dakota ("Lower Brule III"), 917 F. Supp. 1434, 1457 (D.S.D. 1996). Applying the analytical framework of Montana, Bourland III, and Brendale, the court held (1) Congress has abrogated any treaty rights that provided the Tribe with the authority to regulate hunting and fishing by nonmembers on both fee lands and waters and in the taken areas; (2) the Tribe's inherent sovereignty does not extend to the regulation of hunting and fishing by nonmembers on fee or taken lands either by virtue of a consensual relationship with the Tribe or because of a threat to the political integrity, economic security, or health and welfare of the Tribe; and (3) the State has exclusive jurisdiction to regulate nonmember hunting and fishing within both the fee and taken areas at issue. The Tribe appeals, arguing both that there are disputed material facts that make summary judgment inappropriate and that the court erred as a matter of law in determining that the

State has exclusive jurisdiction to regulate hunting and fishing on non-trust lands within the Reservation.

II.

To provide some context for this dispute, we begin with a basic history of the Lower Brule Sioux Reservation. A more comprehensive background discussion, with particular detail about the relevant treaties and taking acts, is contained in Lower Brule I, 540 F. Supp. at 278-86.

The Fort Laramie Treaties of 1851, 11 Stat. 749 (1851), and 1868, 15 Stat 635 (1868), established the boundaries of the Great Sioux Nation. See United States v. Sioux Nation of Indians, 448 U.S. 371 (1980). The Lower Brule Sioux Reservation was established as part of a March 2, 1890 act of Congress that divided the Great Sioux Nation into five smaller ones. See 25 Stat. 888 (1889). The Reservation is situated in central South Dakota in northeastern Lyman County and extends slightly into the southeastern corner of Stanley County. The Reservation is bounded on the northeast and east by the Missouri River. The original area of the Reservation, which consisted of 446,500 acres, was twice diminished by Congress: first by the Act of March 3, 1899, 30 Stat. 1362 (1899), and second by the Act of April 21, 1906, 34 Stat. 124 (1906). The present Reservation consists of approximately 235,800 acres.

The two classifications of Reservation areas at issue in this litigation are nonmember-owned fee lands and waters and the areas taken by the Army Corps of Engineers for two flood control projects. Approximately 56,634 acres, or roughly one-quarter of the total Reservation land, is deeded land held in fee by either members or nonmembers of the Tribe. Under the Indian General Allotment Act, 24 Stat. 388 (1887), significant portions of the Reservation were allotted to individual tribal members as part of Congress's widespread attempt to disestablish reservations and to force Indians to

assimilate into the dominant white culture modeled on individual property ownership. After a period of years during which the allotments were held in trust, fee patents were issued. See Id. at 398 § 5. Assisted by legislation aimed at opening the Reservation to non-Indian development, see e.g., 30 Stat. 1362 (1899), 34 Stat. 124 (1906), piecemeal sales of fee lands up to the time of the Indian Reorganization Act of 1934 created what is often called a "checkerboard" map of trust lands, tribal lands, allotted lands, and fee lands. The boundaries between the variously classified lands are not marked, making it difficult for persons on the Reservation to determine the ownership status of any given site.

The other relevant land classification is land taken under the United States' power of eminent domain for construction of two projects as part of a comprehensive flood control plan for the Missouri River as authorized by the Flood Control Act of 1944, Pub. L. No. 78-531, 58 Stat. 887 (1944). Two taking Acts established the territory now at issue: the Fort Randall Taking Act, Pub. L. No. 85-923, 72 Stat. 1773 (1958), and the Big Bend Taking Act, Pub. L. No. 87-734, 76 Stat. 698 (1962). Collectively, the projects required the taking of 22,296 acres of Indian lands. Under the terms of the Fort Randall Taking Act, the Tribe maintained the right to graze stock on the land and a right of free access for members to hunt and fish. According to the Big Bend Taking Act, the United States acquired the "entire interest" of the Tribe, including gravel and any interest the Tribe may have had within the bed of the Missouri River; the Tribe maintained the right to graze on the land and free access for hunting and fishing.

III.

We review the district court's grant of summary judgment de novo, applying the same standard as the district court. Lebus v. Northwestern Mut. Life Ins. Co., 55 F.3d 1374, 1376 (8th Cir. 1995). Summary judgment is appropriate if the

movant demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). As explained by the district court:

> [T]he facts and inferences from those facts are viewed in the light most favorable to the nonmoving party and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-90 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in the pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists.

Id.

We must examine the evidence in the context of the legal issues involved. Thus, it is not enough that there are factual disputes between the parties, "the dispute[s] must be outcome determinative under prevailing law." Holloway v. Pigman, 884 F.2d 365, 366 (8th Cir. 1992). We agree with the district court that under existing precedent summary judgment is appropriate to resolve this dispute. A careful review of the record, including the Tribe's response to the State's motion for summary judgment and response to the State's statement of material facts, reveals that to the extent that the parties disagree on factual matters, none of the disputes is outcome determinative once put in legal context.[1]

[1] The Tribe raises numerous factual disputes which it believes should have prevented the district court from issuing summary judgment. After careful consideration of each of these claims, we have determined that none are material to the resolution of the issues presented in this case.

Thus, we agree that the record presents no genuine issues of disputed material facts.

IV.

Tribal jurisdiction to regulate hunting and fishing by nonmembers on nonmember-owned fee lands and taken lands derives from either of two sources: treaty rights or inherent tribal sovereignty. See Montana v. United States, 450 U.S. 544, 556-58 (1981). We examine each source of jurisdiction separately as it applies to the different land classifications.

A. Fee Lands and Waters

1. Treaty Rights

Consistent with Supreme Court precedent, the district court held that any right to regulate hunting and fishing by nonmembers on nonmember-owned fee lands originally obtained by the Tribe under the Fort Laramie Treaty of 1868 was abrogated by the Indian General Allotment Act of 188,. Lower Brule T-I, 917 F. Supp at 1446. In 1863, the Fort Laramie Treaty gave the Tribe the right of "absolute and undisturbed use and occupation" of Reservation lands. 15 S~at. 6~. This authority to exclude nonmembers from the land also carried the lesser authority to regulate the activities of nonmembers to whom the Tribe permitted access. See Montana, 450 U.S. at 559; Bourland III, 508 U.S. at 688-89. Treaty rights obtained by the Tribe under the Fort Laramie Treaty, however, were abrogated by Congress with the passage of the General Indian Allotment Act of 1887. Brendale, 492 U.S. at 425; Montana, 450 U.S. at 559. As the Court explains:

> Montana and Brendale establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands.

The abrogation of this greater right . . . implies the loss of the regulatory jurisdiction over the use of the lands by others. Bourland III, 508 U.S. at 689. After the General Indian Allotment Act, the Tribe no longer retains the exclusive use and benefit of the land, and Congress did not expressly delegate authority to the Tribe to regulate nonmember conduct on nonmember-owned fee lands. Therefore, whatever regulatory power the Tribe has under the treaty no longer extends to lands held in fee by nonmembers.

2. Inherent Sovereignty

Indian tribes have inherent sovereignty independent of treaty rights and the authority derived from their power to exclude nonmembers from tribal lands. Despite their dependence on the United States, tribes generally retain sovereignty in the form of tribal self-governance and control over other aspects of tribal internal affairs. See Montana, 450 U.S. at 564. A tribe's inherent sovereignty, however, is divested to the extent that it is inconsistent with the tribes's dependent status, that is, "to the extent it involves a tribe's 'external relations.'" Brendale, 492 U.S. at 425-26 (quoting United States v. Wheeler, 435 U.S. 313, 326 (1978)); see also Montana, 450 U.S. at 564 ("[E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation.").

In Montana, the Supreme Court recognized two possible exceptions to the general rule that inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. 450 U.S. at 565-66. First, "tad tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements." Id. at 565. Second, a tribe may regulate conduct that "threatens or has some direct effect on the political integrity,

the economic security, or the health or welfare of the tribe." Id. at 566.

We agree with the district court that the first Montana exception is inapplicable. Neither the original title deeds for the lands nor the purchase of hunting and fishing licenses give rise to the requisite consensual relationship between the Tribe and nonmembers who hunt and fish on the fee lands. See South Dakota v. Bourland ("Bourland IV"), 39 F.3d 868, 869 (8th Cir. 1994); Montana, 450 U.S. at 566.

The Tribe also argues that the record supports a finding that, under the second Montana exception, it retains the power to regulate hunting and fishing by nonmembers on nonmember-owned fee lands because the conduct affects the Tribe's economic, political, and social welfare. Specifically, the Tribe asserts that state regulation will: (1) deprive the Tribe of licensing revenues; (2) adversely affect game populations on trust lands; and (3) cause confusion and discourage the use of the Reservation due to the complexities of complying with separate laws in adjoining areas.[2] While noting that these same factors were present in either or both Montana and Bourland III and that the adverse impact was insufficient to establish tribal jurisdiction, the district court conducted the necessary "particularized inquiry into the unique facts and circumstances surrounding the Lower Brule Reservation and the Lower Brule Tribe." Lower Brule III, 917 F. Supp. at 1447; see also Brendale, 492 U.S. at 428-30. The court specifically took into account the Tribe's history, economy, and population mix. Lower Brule III, 917 F. Supp. at 1447.

[2] In its motion opposing summary judgment before the district court the Tribe additionally argued that it was adversely impacted by the lost job opportunities for its members who would perform regulatory functions. The Tribe appears to have abandoned this argument on appeal. Although we do not specifically address this issue, we note that our decision would not be altered by the inclusion of this claim.

The court concluded that State regulation of nonmember hunting and fishing does not threaten the political integrity, economic security, or health and welfare of the Tribe. Id. at 1449.[3] With respect to licensing fees, the court found that revenue from licensing accounts for only a small fraction of the dollars spent by hunters and fishers and that, in light of the economic strength of the Tribe, lost revenues do not pose a significant threat to the economic security of the Tribe. With respect to migrating game populations, the court acknowledged that wildlife herds migrate throughout the Reservation and that nonmember hunting on nonmember owned fee lands will reduce the overall deer population on tribal land to some extent. Yet, the court found no evidence on the record to support a determination that the harvesting of deer on nonmember fee lands threatened the overall welfare of the Tribe. See Bourland IV, 39 F.3d at 870 (noting that incidents of deer harvesting by nonmembers are "undeniably vexatious to the individual Indians affected" but do not amount to a direct threat to the welfare of the Tribe as a whole). For example, there is no evidence that a significant number of tribal members depend on wild game for their sustenance or livelihood. Finally, the court acknowledged that there are unmarked boundaries between the various types of Reservation land and that separate laws enforced by distinct governments on adjoining lands can create some confusion. Nonetheless,

[3]The State asks us to adopt the more stringent standard set forth in Justice White's plurality opinion in Brendale. In Brendale, Justice White wrote that for an Indian tribe to retain jurisdiction over nonmembers pursuant to the second Montana exception, "[t]he impact [on tribal interests] must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe." Brendale, 492 U.S. at 431 (emphasis added); see also Bourland IV, 39 F.3d at 870 n.4. As in Bourland IV, we need not determine whether the Brendale plurality opinion modified the second Montana exception. The district court explicitly analyzed the Tribe's arguments under the framework of Montana, avoiding the more stringent arguable modification in Brendale. Lower Brule III, 917 F. Supp. at 1446. We do the same. We note only that affirmance under the less stringent standard as originally articulated in Montana necessarily implies a failure to satisfy a more stringent application of the exception. See Bourland IV, 39 F.3d at 870 n.4.

the court recognized that the Supreme Court has authorized exactly this kind of "checkerboard" jurisdiction by mandating that neighboring lands be subject to different regulatory authorities. Lower Brule III, 917 F. Supp. at 1448 (citing Bourland II, 949 F.2d at 996).

We hold that the district court did not err in its determination that the Tribe failed to establish sufficient evidence to prevent summary judgment on the jurisdictional issue over nonmember-owned fee lands and waters. We also find no error in the court's conclusion that no principles of federal Indian law preclude the State from lawfully exercising jurisdiction over nonmembers on the fee lands and waters at issue. We hasten to add, however, that the Tribe may seek relief in the district court in the future if circumstances change in kind or degree so as to directly affect or threaten the political integrity, economic security, or health and welfare of the Tribe as a whole. See Bourland IV, 39 F.3d at 871.

B. Taken Lands

Also at issue is jurisdiction over hunting and fishing by nonmembers on lands and waters located in the Fort Randall and Big Bend taken areas within the boundaries of the Reservation. The district court held that Congress's exercise of eminent domain abrogated the Tribe's treaty rights and that the Tribe's inherent sovereignty does not extend to the regulation of hunting and fishing by nonmembers in the taken areas.

As the Supreme Court explains, "regardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." Bourland III, 508 U.S. at 692 (footnote omitted). Thus, it is necessary to look to the language of the Acts which effectuated the takings. Section 1 of the Fort Randall Taking Act, Pub. L. No. 85-923, 72 Stat. 1773,

provides that the payments by the United States to the Lower Brule Sioux Tribe were in "settlement of all claims, rights, and demands of said tribe." Section 1 of the Big Bend Taking Act, Pub. L. No. 87-734, 76 Stat. 698, is almost identical. Both provisions indicate that there was a mutual understanding between the United States and the Tribe that the Acts set forth all of the terms of the transaction and all the rights the Tribe would retain under the agreements. Section 5 of the Fort Randall Taking Act explicitly provides that the Tribe retains two rights, without cost: first, to graze livestock and, second, to hunt and fish in the taken area subject to the regulations governing the corresponding use of the land by other United States citizens. Similarly, Section 10 of the Big Bend Taking Act reserves for the Tribe and its individual members the right to hunt and fish on the taken area subject to the laws applicable to other citizens doing the same.

The provisions set out above are almost identical to Sections 2 and 10 of the Cheyenne River Act, 68 Stat. 1191 (1954) (taking land for the Oahe Dam and Reservoir project in furtherance of the Flood Control Act of 1944), construed by the Supreme Court in Bourland III. In that case the Court concluded, "Congress, through the Flood Control and Cheyenne River Acts eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe [pursuant to the Fort Laramie Treaty of 1868]." Bourland III, 508 U.S. at 689. Similarly, the Fort Randall and Big Bend Taking Acts must be construed to deprive the Tribe of any treaty right to regulate nonmember hunting and fishing in the taken areas. Thus, the district court correctly reached this conclusion.

The Tribe does not challenge the court's conclusion as to extinguishment of treaty rights[4] so much as it asserts that only

[4] Nor does the Tribe challenge the district court's conclusion that neither Montana exception is applicable and, therefore, the Tribe does not have inherent authority to regulate the hunting and fishing by nonmembers on the taken lands.

the federal government, not the State, has jurisdiction to regulate nonmembers' activities in the taken areas. It is clear that Congress provided the Army Corps of Engineers with the regulatory control over the taken areas. 16 U.S.C. § 460d; see also Bourland III, 508 U.S. at 690. The district court determined that the Corps has the authority to relegate partial jurisdiction over the taken areas to the State and that the Corps has in fact entrusted the State with that regulatory authority. We reject the Tribe's arguments that Congress preempted all State jurisdiction and agree with the district court's conclusions.

It is apparent from the language of the Flood Control Act of 1944 that Congress did not preempt state law. The Act provides: "No use of any area to which [the Flood Control Act] applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated." 16 U.S.C. § 460d (emphasis added). Also, both the Fort Randall and Big Bend Taking Acts grant tribal members permission to hunt and fish within the taken areas, "subject, however, to regulations governing the corresponding use by other citizens of the United States." Fort Randall Taking Act, § 5; Big Bend Taking Act, S 10. This language recognizes that other regulations may impact the lands. See Bourland III, 508 U.S. at 691. In light of the fact that there are no comprehensive federal hunting and fishing regulations in effect for the taken areas, we agree with the district court's observation that this language indicates Congress anticipated that the federal government would rely heavily on state regulation.

Moreover, the federal government has consistently expressed the view that the State has jurisdiction to regulate hunting and fishing by nonmembers on the taken lands. In a March 6, 1976 letter to the Tribe's Chairman, a Corps engineer stated in relevant part:

> That lands purchased and/or condemned by the United States for the Ft. Randall and Big Bend Projects were returned to the public domain, and, as such, fall within the civil and criminal, or legislative jurisdiction of the State of South Dakota.
>
> That the fish and game laws of the State of South Dakota are the only such laws that apply to these areas which were formerly owned by the Lower Brule Sioux Tribe and its members.

(App. of Appellee II at B.7 (Letter from Col. Russell A. Glen, District Engineer for the Army Corps of Engineers to Tribal Chairman Michael B. Jandreau)). Similarly, in a September 15, 1986 letter, the Corps reiterated its position:

> [R]egulation of hunting and fishing on Corps project lands in South Dakota is a matter of State law. This was clearly the intent of Section 4 of the 1944 Flood Control Act . . . . As you know, the Corps has only proprietal jurisdiction over its project lands along the mainstem of the Missouri River in South Dakota. Such lands are subject to state civil and criminal jurisdiction.

(App. of Appellee II at B.9 (Letter from Col. Steven G. West, District Engineer for the Army Corp of Engineers to Secretary Jeff Stingley of South Dakota Fish and Parks)). The rules and regulations set forth by the Corps to govern public use of the taken lands and waters likewise provide for application of state laws. See, e.g., 36 C.F.R. § 327.8 (1995) (providing that all federal, state, and local laws pertaining to hunting, fishing, and trapping apply on project lands); 36 C.F.R. § 327.26 (1995) (similar). We agree with the district court that the Army Corps of Engineers has the authority to delegate regulatory and enforcement responsibilities to the State. We also agree that the Corps has clearly manifested its intention to do so on the projects lands and waters at issue in this case.

V.

In conclusion, we affirm the district court's holding that the State has exclusive regulatory jurisdiction over hunting and fishing by nonmembers on both nonmember-owned fee lands and the taken area within the Reservation.

BEAM, Circuit Judge, concurring and dissenting.

Judge Heaney has written a very well-reasoned opinion for the court in which I concur, except for part IV A.2. dealing with inherent sovereignty. For the reasons I advanced in A-1 Contractors v. Strate, 76 F.3d 930, 941-42 (8th Cir.), cert. granted, 117 U.S. 37 (1996), it is my view that the Tribe has a "valid tribal interest" in the regulation of hunting and fishing activities on all lands, whether tribal, member-owned, or nonmember-owned, within the geographic confines of the reservation. Thus, the second exception set forth in Montana v. United States, 450 U.S. 544, 566 (1981) - holding that a tribe may regulate, as a sovereign, conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe," - requires abatement of South Dakota's effort to invade tribal territory.

I believe that the district court (and this court in affirming the district court) effects an incorrect analysis of the sovereignty issue at play in this case. The court says "[w]e hold that the district court did not err in its determination that the Tribe failed to establish sufficient evidence [of sovereignty] to prevent summary judgment . . . ." Supra at 12. This is not (or at least should not be) the test.

"Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." United States v. Wheeler, 435 U.S. 313, 323 (1978) (emphasis supplied). Until Congress acts, the Tribe possesses those aspects of sovereignty not withdrawn by treaty or statute. Id. "Tribal authority over the activities of non-Indians

on reservation lands is an important part of tribal sovereignty." Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9, 18 (1987). Although speaking specifically of tribal court jurisdiction, the Supreme Court noted that, "[c]ivil jurisdiction over such activities [of non-Indians on reservation lands] presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute." Id. (emphasis supplied). "'Because the Tribe retains all inherent attributes of sovereignty that have not been divested by the Federal Government, the proper inference from silence . . . is that the sovereign power . . . remains intact.'" Id. (quoting Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 149 n.14 (1982)).

South Dakota asserts its own sovereign power when it regulates hunting and fishing outside of the reservation but within the borders of the State. The sovereignty of the Tribe over the lands of the reservation when such sovereignty is unencumbered by treaty or federal law, as here, provides equal, if not superior, authority to the Lower Brule government. And the State's sovereignty, it seems to me, in no way attenuates, displaces, or makes subservient the territorial sovereignty of an Indian tribe on reservation lands that also lie within the boundaries of South Dakota – at least such sovereign power as is necessary to regulate fishing and wildlife activity. Indeed, we recognize in this very case the authority of the Tribe to regulate these activities on parts of the reservation and its long-standing use of this authority. Accordingly, there is, in my view, a presumption of Lower Brule sovereign power sufficient to regulate hunting and fishing within the outer boundaries of the reservation (except for the taken lands) since neither treaty nor congressional act has affirmatively abrogated these retained tribal powers, powers that have existed since prior to South Dakota statehood.

Thus, it seems to me that it is South Dakota and not the Tribe that has the "laboring oar" on the issue of fishing and

wildlife jurisdiction over nonmember fee lands and waters within the reservation. In my view, the State has fallen woefully short of sustaining its burden under the rules we apply to motions for summary judgment.

It is well settled that a waive of tribal sovereign immunity "'cannot be implied but must be unequivocally expressed."' Santa Clara Pueblo v. Martinez 436 U.S. 49, 58 (1978)(quoting United States v. Testan, 424 U.S. 392, 399 (1976)). And the Supreme Court has said: "We found [in McClanahan v. Arizona State Tax Commission, 411 U.S. '64, 168 (1973)] a 'deeply rooted' policy in our Nation's history or leaving Indians free from state jurisdiction and control."' Oklahoma Tax Comm'n v. Sac and Fox Nation, 508 U.S. 114, 123 (1993). Thus, although not directly on point, these holdings dictate that on the facts of this case, as we presently know them, South Dakota should not be allowed to substitute its sovereign power for the presumptive sovereignty of the Tribe over lands within the reservation.

I do not read the holding in Montana v. United States to be to the contrary. The issue of inherent sovereignty, or not, is a fact-driven inquiry or, at least, a mixed question of fact and law, and the evidence in this case is significantly different than in Montana.

In Montana, there was a trial at which evidence was adduced by the State showing that Montana had, since 1928, "engaged in an extensive fish-stocking program throughout the waters of the Crow Indian Reservation," United States v. Montana 457 F. Supp. 599, 605 (1978) and that the State had both stocked and introduced nonindigenous game birds and indigenous game animals on reservation lands and areas adjacent to the reservation. Id. There was also evidence that the Crow Tribe had taken only a mild interest in fishing and wildlife management and then only within about five years or less prior to the 1978 trial. Id. at 610. The passage of the Tribal resolution at issue in the litigation prohibiting all

nonmembers (including presumably nonmember fee owners) from fishing or hunting within the boundaries of the reservation occurred in 1973. Id ~ This action was the first formal exercise of fish and wildlife jurisdiction in tribal history. Id. On the other hand, the Supreme Court observed that Montana had "traditionally exercised 'near exclusive' jurisdiction over hunting and fishing on fee lands within the reservation." 450 U.S. at 564 n.13. The Supreme Court noted that under the facts of the Montana case there was no showing of a threat to the political or economic security of the Crow Nation, and there was not even an allegation in the complaint concerning impact upon the health and welfare of the Tribe. Id. at 566. Therefore, it is readily evident that even with the limited facts available in this matter through the cross motions for summary judgment, this is a radically different case than Montana.

If the Tribe were to purchase in fee simple absolute 10,000 acres of prime hunting and fishing land along the Missouri River outside of the reservation, I am confident that the State would seek to apply its sovereign power, and rightly so, to regulate hunting and fishing activities on such non-reservation property. If the Tribe sought to transfer its sovereignty to the property, the State would make all the same arguments that the Tribe makes in this case as to why such activity would affect the political integrity, the economic security, and the health and welfare of the people of South Dakota. Those arguments would be valid. Likewise, the Tribe's well-used sovereign power over fishing and hunting on the Lower Brule Reservation lands should not be squeezed out by the State, whomever may hold title to individual parcels of property in this part of Indian country.

Does the overlapping, checkerboard-style wildlife regulation scheme[5] over the lands within the reservation suggested by South Dakota threaten or have some direct effect on the political integrity, the economic security or the health and welfare of the Tribe? Applying the above examples, policies, and principles to this question, there can be little doubt that the answer is in the affirmative. And even if the proposition is ambiguous, it is up to South Dakota to rebut with clear and convincing evidence the presumption of tribal sovereignty, not vice versa.

Thus, I respectfully dissent from the holding of the court in part IV A.2. of the opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

[5] The court, like the district court, gives too little weight to the Tribe's credible contention that "checkerboard" jurisdiction will impair the Tribe's integrity by creating confusion and discouraging use of the reservation. Supra, at 11; 917 F. Supp. at 1448. To say that the Supreme Court has "authorized exactly this kind of 'checkerboard' jurisdiction" when the facts so indicate, supra, at 11, does not mean that we are to simply ignore the effect of such a result on the Tribe in considering tribal sovereignty. Indeed in Brendale, the problems presented by inconsistent dual zoning regulations that frustrated tribal land management clearly informed the Court's conclusion that the Yakima Nation retained regulatory authority on fee lands in a portion of the reservation. 497 U.S. at 442-44.

APPENDIX B - MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA FILED FEBRUARY 8, 1996

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
CENTRAL DIVISION

LOWER BRULE SIOUX TRIBE,	)	CIV. 91-3036
	)	
Plaintiff,	)	MEMORANDUM OPINION
	)	GRANTING
	)	DEFENDANTS' MOTION
vs.	)	FOR SUMMARY
	)	JUDGMENT
STATE OF SOUTH DAKOTA,	)	
and JOHN COOPER,	)	
Secretary, Division of Game,	)	
Fish and Parks for the State of	)	
South Dakota,	)	
	)	
Defendants.	)	

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NATURE AND PROCEDURAL HISTORY

This litigation was first commenced on August 4, 1980, when the Lower Brule Sioux Tribe (hereinafter "Tribe") filed suit against the State of South Dakota and the acting Secretary of Game, Fish, and Parks (hereinafter "State"). The Tribe sought both injunctive relief and a declaration of the rights of the parties with respect to the enforcement of hunting and fishing laws as to Indians and non-Indians within the exterior boundaries of the Lower Brule Sioux Reservation (hereinafter "Reservation"). On cross motions for summary judgment, the Court reserved ruling on matters pertaining to the land outside the Fort Randall[1] and Big Bend[2] taken areas, but did hold that the State had exclusive jurisdiction to regulate hunting and fishing by all persons on the land within said taken areas. Lower Brule Sioux Tribe v. South Dakota, 540 F. Supp. 276, 292 (D.S.D. 1982) (Bogue, J.). The Eighth Circuit Court of Appeals reversed the trial court's holding as it pertained to the regulation of tribal members, concluding that the Tribe possessed exclusive jurisdiction to regulate hunting and fishing by tribal members in the taken areas and remanded the case for a redetermination as to the regulation of nonmember Indians within the taken areas. Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809, 813 (8th Cir. 1983).

[1] See generally Fort Randall Taking Act, Pub. L. No. 85-923, 72 Stat. 1773 (1958) (providing compensation to the Tribe and its members for the land acquired to construct the Fort Randall Dam and Reservoir Project).

[2] See generally Big Bend Taking Act, Pub. L. No. 87-734, 76 Stat. 698 (1962) (authorizing the acquisition of and payment for tribal and trust lands on the Lower Brule Reservation for the Big Bend Dam and Reservoir Project).

On October 24, 1986, the parties entered into a Memorandum of Agreement,[3] thereby obviating any necessity for further hearing on remand. This five-year agreement expired on October 23, 1991. The parties did not agree on an extension or mod)fication of the agreement; accordingly, the Tribe commenced this action on October 24, 1991. The issues

[3] This Memorandum of Agreement provided that: (1) the Tribe would manage all game populations, including the setting of seasons, issuance of license and conducting of hunting seasons within the boundaries of the Indian Reservation; (2) any person hunting within the Reservation boundaries must be licensed in accordance with tribal regulations; (3) nonmembers of the Tribe need not purchase the state licenses when hunting on the Reservation; (4) nonmembers may hunt waterfowl on the Missouri River and shoreline area with only the state license and federal duck stamp; (5) nonmembers of the Tribe hunting migratory waterfowl on the Reservation must also be in possession of a federal migratory bird hunting stamp (duck stamp); (6) the State will manage the fisheries in the Missouri River on and adjoining the Reservation; (7) nonmembers of the Tribe must purchase the required state fishing license to fish in the Missouri River without the requirement to purchase the tribal permit; (8) tribal members may fish in those waters with only the tribal permits, but must abide by the seasons, bag limits, and methods established for nonmembers; (9) the Tribe agrees to allow access to and from these waters by nonmembers through the public roads and access areas without charge.

Additionally, the parties agreed to continue to cooperate, develop, and improve the fish and wildlife resources on the Reservation by prohibiting the use of gill or trammel nets, requiring the use of steel shot in the hunting of migratory waterfowl in accordance with the state non-toxic shot implementation schedule and prohibiting the sale of fish or game or other Such practices that would be detrimental to game and fish resources. The agreement further provided for an active enforcement of the prohibitions contained within the agreement and cross-deputization of tribal and state law enforcement officers for the purpose of carrying into effect the intent and purposes of the agreement. The parties essentially followed the agreement in all of its terms with the exception that the Tribe unilaterally decided and followed a policy of not requiring tribal licenses for those nonmember persons hunting on land that such nonmembers either owned or leased (fee lands).

presented involve a determination of the respective authority of the State and the Tribe as to the regulation of hunting and fishing by nonmember Indians and non-Indians on fee lands and Corps lands within the exterior boundaries of the Reservation.[4] It is important to understand what this decision does not concern. It is not about State regulation of tribal members on any land within the exterior boundaries of the Reservation.

The Court held an evidentiary hearing on November 8, 1991, on the issue of preliminary injunctive relief. It issued its preliminary injunction continuing the terms of the 1986 agreement. Before the Court could hold a hearing on permanent injunctive relief, it removed the case from its trial calendar, staying the action pending the final resolution of South Dakota v. Bourland, 949 F.2d 984 (8th Cir. 1991) (Bourland II), a case involving similar issues affecting the Cheyenne River Sioux Tribe. The issue in Bourland II was whether the Cheyenne River Sioux Tribe, located further upstream on the Missouri River, had authority to regulate non-Indian hunting and fishing on lands within the boundaries of its reservation. This land was taken by the United States for the construction and operation of the Oahe Dam and

[4] Fee lands are lands owned "in fee" (individual ownership) by either nonmembers or members of the Reservation either resident or non-resident. Corps lands are lands taken for construction of the Big Bend and Fort Randall dams across the Missouri River.

Reservoir, a flood control project of the United States Army Corps of Engineers. Bourland II was decided by the Eighth Circuit on November 21, 1991. When the Supreme Court granted certiorari, this Court continued its stay. The Supreme Court issued its decision on June 14, 1993.[5] Finally, upon remand, the Eighth Circuit Court of Appeals resolved the remaining issues presented by Bourland III.[6]

On September 11, 1995, this case proceeded. The State filed a motion for summary judgment requesting the Court to find that the State has exclusive jurisdiction over nonmember Indians and non-Indians hunting and fishing on the lands and waters within the boundaries of the Reservation and within the Fort Randall and Big Bend taken areas, as well as the lands and waters owned in fee by any nonmember Indian. Appropriate responses have been filed. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1362.

FACTS

Congress established the boundaries of the Great Sioux Nation in the Fort Laramie Treaty of 1851, 11 Stat. 749 (1851), and 1868, 15 Stat. 635 (1868). United States v. Sioux Nation of Indians, 448 U.S. 371, 374-77, 100 S. Ct. 2716, 2720-21, 65 L. Ed. 2d 844 (1980). The Lower Brule Sioux R Reservation was created by act of Congress on March 2, 1889, 25 Stat. 888, which divided the Great Sioux Nation and described the Reservation boundaries. The present day Reservation is centrally located in South Dakota, bounded on the northeast and east by the Missouri River. It is located in the northeastern two-thirds of Lyman County, with a small

[5] South Dakota v. Bourland, 508 U.S. 679, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993), rev 949 F.2d 984 (8th Cir. 1991) (Bourland III).

[6] South Dakota v. Bourland, 39 F.3d 868 (8th Cir. 1994) (Bourland IV).

portion in the southeastern corner of Stanley County. The northwestern corner of the Reservation is approximately 15 miles southeast of Pierre, South Dakota, the state capital. The southeastern corner of the Reservation is approximately eight miles northwest of Chamberlain, which is north of United States Interstate 90. The Reservation is served by state highway 47 and state highway 1806 which traverses the Reservation generally following the course of the Missouri River. The Reservation community of Lower Brule is located approximately eight miles northwest of Big Bend Dam, a large earthen dam spanning the river, creating Lake Sharp. The Fort Randall Dam, located at Pickstown, is a large mainstream dam which backs water several miles upstream, as far as the Big Bend Dam. The Fort Randall Dam created Lake Francis Case.

Pursuant to the Indian Reorganization Act of 1934, the Tribe was incorporated and its constitution approved by the Secretary of Interior on November 27, 1935. Act of June 18, 1934, 48 Stat. 984, (as amended by the Act of June 15, 1935 (Pub. L. No. 74-147)). The Tribe's membership consists of all persons of Indian blood whose names appeared on the tribal roll as of April 1, 1935, including all children born to any such member resident of the Reservation at the time of their birth. The membership also includes children born to any member after the effective date of the tribal constitution and possessing at least one-fourth degree Lower Brule Indian blood regardless of the residence of the parents at the time of their birth. The Tribe's population as of the 1983 census was 1,035 resident Indians, with a total tribal enrollment of 1,791. Approximately 10 percent of the residents on the Reservation are nonmembers, consisting principally of employees of the BIA Indian Health Service and nonmember ranchers living on the Reservation.

This litigation involves two separate land classifications within the Reservation--fee land and taken area land. The first class of land is fee lands owned by either members or nonmembers and acquired through the process of allotment.

The General Allotment Act of 1887 effectuated the congressional policy of forcing Indian tribes to assimilate into the white culture by authorizing the issuance of fee patents to individual tribal members. Dawes General Allotment Act, 24 Stat. 388 (1887), (cod)fied as amended at 25 U.S.C. § 331 et seq.). Section 5 of the Act contemplated that "surplus" land which was not required for the fixed-acreage allotments to tribal members would eventually be opened to non-Indian settlement under the public lands program. See Robert N. Clinton et al., American Indian Law 146-52 (3d ed. 1991). Legislation aimed at opening the Reservation to non-Indian development was enacted in 1899, 30 Stat. 1362, and in 1906, 34 Stat. 124. The piecemeal sale of Indian lands up to the time of the Indian Reorganization Act of 1934 has created what is often referred to as a "checkerboard" map of trust and tribal lands, allotted lands,[7] and fee lands.

The original area of the Reservation which was approximately 446,500 acres has been diminished to the present size of approximately 235,800 acres. Of the 235,800 acres within the Reservation boundaries, only 119,900 acres remain in Indian ownership for Indian use. The 119,900 acres remaining in Indian ownership for Indian use may be further categorized as follows: 76,700 is in tribal trust; 30,000 acres are allotted lands; and 13,200 acres the government owns for Indian use. Indian ownership lands consist of 112,000 acres of open grazing; 400 acres noncommercial timber; 6,900 acres dry farm; 400 acres irrigated; and 200 acres as non-agriculture. Approximately one-quarter of the Reservation, 56,634 acres, is deeded land held in fee. The boundaries between fee lands, trust lands, tribal lands, and allotted lands are not marked by boundary markers, making it difficult for persons entering the Reservation to determine the

[7] Allotted lands are lands acquired by Indians pursuant to the General Allotment Act, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. § 334 et seq.). Certain allotted lands may continue to remain in trust status.

ownership of the checkerboard tracts of land. Furthermore, the wildlife herds migrate from and across all of such land, thereby creating different problems for law enforcement. The Court does note that the Tribe has reacquired certain lands and continues to pursue such a policy. See South Dakota v. United States Dep't of Interior, 69 F.3d 878 (8th Cir. 1995) (concerning the Lower Brule Sioux Tribe's attempted acquisition and placement of land into trust status).

The second land class at issue in this case is land referred to as taken lands acquired for construction of the Big Bend and Fort Randall dams spanning the Missouri River. In order to prevent flooding of the lower Missouri River basin, Congress enacted the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887 (cod)fied as amended at 16 U.S.C. § 460d (1993)), which authorized the establishment of a comprehensive flood control plan for the Missouri River. Seven subsequent congressional enactments authorized limited takings of Indian lands for hydroelectric and flood control dams on the Missouri River. See Lower Brule, 711 F.2d at 813 n.1. This case involves the taken areas created by two of these Acts--the Fort Randall Taking Act, Pub. L. No. 85-923, 72 Stat. 1773 (1958) and the Big Bend Taking Act, Pub. L. No. 87-734, 76 Stat. 698 (1962). The Fort Randall Act provided compensation to the Tribe and individual Indian land owners for the lands acquired for the Fort Randall Dam and Reservoir Project. The Big Bend Act provided for the acquisition of and compensation for individual Indian and tribal lands required for the Big Bend Dam and Reservoir Project. The construction of the Fort Randall and Big Bend Dams on the Missouri River (1946-64) required the taking of 22,296 acres of Indian lands. The construction of the dams required 69 percent of the Reservation Indian families to be relocated to higher ground.

In 1961 the Tribe adopted a Game and Fish Management Code which required non-Indians to abide by tribal game and fish regulations, as well as the laws of the state of South

In 1961 the Tribe adopted a Game and Fish Management Code which required non-Indians to abide by tribal game and fish regulations, as well as the laws of the state of South Dakota. On June 2, 1982, the Tribe adopted the Wildlife Management Code of 1982 in order to provide for the management and control of wildlife, fishery, and outdoor recreation resources of the Reservation. At that time, the Tribe intended that the hunting and fishing laws of the State would not be applicable to the territory within the exterior boundaries of the Reservation as to either tribal members or non-tribal members. This extensive Code specifically addressed all lands within the exterior boundaries of the Reservation. The Code provides for the propagation, conservation, management, distribution, transportation, storage, and taking of fish and game, relating to the management, conservation, and control of Reservation lands, forests, and waters for fish and game purposes. The Code further regulated fishing, hunting, trapping, timbering, selling, bartering, and exchange of fish, game, timber, and timber products. It included regulation of boats, snowmobiles, and other off-the-road recreational vehicles, as well as outdoor recreational activities.

On occasion the Tribe and the State have adopted conflicting hunting and fishing regulations, creating confusion and tension. See Lower Brule, 711 F.2d at 814 (providing an example of conflicting regulations pertaining to the use of lead or other toxic shot for hunting water fowl). The Tribe did not enforce its regulations on the Missouri River during the period of the 1986 agreement with the State; however, prior to the 1986 agreement the Tribe did require a tribal hunting license within the taken areas. As early as May 3, 1973, the Tribe, acting in cooperation with the Bureau of Indian Affairs (BIA) and the Bureau of Sport Fisheries and Wildlife, organized the Lower Brule Department of Outdoor Recreation to promote and develop the wildlife, recreational, and natural resources of the Reservation.

Since 1980 the Tribe has contracted on several occasions with the BIA for the purpose of wildlife and fish management. The Tribe currently manages its fish and wildlife enterprises through the "Lower Brule Wildlife Enterprise" (Wildlife Enterprise). This enterprise was established by the Lower Brule Tribal Council on January 11, 1989, as a successor to the Lower Brule Department of Outdoor Recreation. The original purpose of Wildlife Enterprise was to reorganize the wildlife department to include a board of directors, establish program policy and direction, and conduct all of those responsibilities that pertain to budgeting, personnel, programs, and the supervision of such matters. Wildlife Enterprise is governed by a seven-person board of directors consisting of both members and nonmembers. The State has also played an active role in both the management and enhancement of Reservation wildlife and fisheries. The State's involvement, as is the case with the Tribe, is largely pursuant to contracts and grants from the federal government. A de minimus amount of State revenues have been utilized for management and enhancement programs on the Reservation.

The Tribe has actively and aggressively attempted to develop its recreational opportunities by the printing and distribution of various advertising brochures. Recreation associated with wildlife generates substantial year-round revenue and Reservation activity. Both parties agree that tribal programs such as a scenic byway, wildlife viewing area, living history reenactment, commercial buffalo operation, marina, and arts and crafts program development play an important economic role on the Reservation. Both the State and the Tribe seek to derive income from non-Indians and nonmember Indians through fees and licenses arising from hunting and fishing on the tee lands and the taken lands; however, only nine cents of every dollar spent by sportsmen on the Reservation is derived from license fees.

SUMMARY JUDGMENT STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if the movant can "show that there is no genuine issue as to any material fact and that [the movant] is entitled to judgment as a matter of law." Poller v. Columbia Broadcasting, Inc., 368 U.S. 464, 467, 82 S. Ct. 486, 7 L. Ed. 2d 458, 488 (1962). In determining whether summary judgment should issue, the facts and inferences from those facts are viewed in the light most favorable to the nonmoving party and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1356-57, 89 L. Ed. 2d 538 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in the pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists.

In determining whether a genuine issue of material fact exists, the Court views the evidence presented based upon which party has the burden of proof under the underlying substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). Recently, the Supreme Court noted that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy, and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986). The nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts," Matsushita, 106 S. Ct. at 1356, and "[w]here the record as a whole could not lead a rational trier of fact to find

for the nonmoving party, there is no 'genuine issue for trial."' Id.

The trilogy of Celotex, Anderson, and Matsushita provide the Court with a methodology in analyzing the State's motion. See generally 1 Steven A. Childress & Martha S. Davis, Federal Standards of Review § 5.04 (2d ed. 1991) (discussing the standards for granting summary judgment that have emerged from Matsushita, Celotex, and Anderson). Under this trilogy, it is incumbent upon the Tribe, based upon the showing set forth by the State, to establish significant probative evidence to prevent summary judgment. See Terry A. Lambert Plumbing, Inc. v. Western Sec. Bank, 934 F.2d 976, 979 (8th Cir. 1991).

DISCUSSION

This case presents three major issues: (1) whether or not a distinction should be drawn between nonmember Indians and non-Indians in the context of civil regulation of hunting and fishing; (2) whether or not the State has exclusive jurisdiction over nonmember Indians and non-Indians on lands and waters owned in fee by nonmembers within the boundaries of the Reservation; and (3) whether or not the State has exclusive jurisdiction over nonmember Indians and non-Indians on lands and waters located in the Fort Randall and Big Bend taken area within the boundaries of the Reservation.

A. INDIAN SOVEREIGNTY

The ever recurring issues of tribal jurisdiction over non-Indians and nonmembers for activities conducted within the exterior boundaries of an Indian reservation have long concerned the courts in both civil and criminal matters. This judicial history provides the Court with a slate upon which certain of these issues have been resolved.

It is well established that "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory." United States v. Mazurie, 419 U.S. 544, 557, 95 S. Ct. 710, 717, 42 L. Ed. 2d 706 (1975) (citing Worcester v. Georgia, 6 Pet. 515, 557, 8 L. Ed. 483 (1832)). See also United States v. Wheeler, 435 U.S. 313, 322, 98 S. Ct. 1079, 1086, 55 L. Ed. 2d 303 (1978); Montana v. United States, 450 U.S. 544, 564, 101 S. Ct. 1245, 1257, 67 L. Ed. 2d 493 (1981). Distilling this principle in the context of civil jurisdiction, Montana held that Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservation, even on non-Indian fee lands. Montana, 101 S. Ct. at 1258. In Washington v. Confederated Tribes of Colville, 447 U.S. 134, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980), the Supreme Court determined that the imposition of a state tax did not "contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those [nonmember] Indians stand on the same footing as non-Indians resident on the reservation." I~ at 2085. Nonmember Indians and non-Indians share the same relation to tribal government, in that neither group can typically vote in tribal elections, participate in the tribal jury system, nor can they hold tribal office. ~ Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 445, 109 S. Ct. 2994, 3016, 106 L. Ed. 2d 343 (1989). In the area of criminal jurisdiction, the Supreme Court in Duro v. Reina,[8] 495 U.S. 676, 110 S. Ct. 2053, 2063, 109 L. Ed. 2d 693 (1990), held that the tribes did not have inherent criminal jurisdiction over nonmember Indians since the "retained sovereignty of the tribe is but a recognition of certain additional authority the tribes maintain over Indians who consent to be tribal members."

[8]Duro v. Reina was promptly overruled by congressional action which re-defined an "Indian" as any person who would be subject to the jurisdiction of the United States as an Indian under section 1153 of Title 18. 25 U.S.C. § 1301(2), (3), and (4).

From this historical perspective, however, the Court is unable to find any judicial precedent, treaty right,[9] or statutory language creating a distinction between nonmember Indians and non-Indians in the context of civil regulation of hunting and fishing. In the Court's analysis of the first issue, no distinction is made between non-Indians and nonmember Indians.

B. JURISDICTION OVER FEE LANDS AND WATERS

The second issue before this Court pertains to jurisdiction within the Reservation boundaries over nonmember Indians and non-Indians on lands and waters owned in fee by any person or entity not a member of the Tribe. The Court finds the Bourland III,[10] Brendale,[11] and Montana [12] trilogy to be instructive in the resolution of this issue.

1. Legal Precedent

In Montana, the Supreme Court held that the Crow Indian Tribe lacked the proper authority to regulate hunting and

[9] To the contrary, the language contained in the Treaty of 1865 between the United States and the Lower Brule Sioux Indians lends itself to the determination that no distinction should be drawn between non-Indians and nonmember Indians. The Treaty of 1865 distinguishes between tribal members and nonmembers binding the Lower Brule Sioux Tribe "to discontinue for the future all attacks upon the persons or property of other tribes, unless first assailed by them...." Treaty of October 14, 1865, 14 Stat. 699, Art. II (1865).

[10] South Dakota v. Bourland, 508 U.S. 679, 113 S. Ct. 2309, 124 L. Ed. 2d 606 (1993).

[11] Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 109 S. Ct. 2994, 106 L. Ed. 2d 343 (1989).

[12] Montana v. United States, 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

fishing by nonmembers on nonmember fee lands. Montana, 101 S. Ct. at 1254. In its analysis, the Court identified tribal treaty rights and inherent tribal sovereignty as two sources of authority which could support a finding that a tribe had the power to regulate nonmember hunting and fishing on nonmember fee lands. Id The Montana Court first determined that under the Fort Laramie Treaty of 1868, 15 Stat. 649 (1868), the Crow Tribe possessed the power to exclude non-Indians from reservation lands, and therefore maintained the power to regulate non-Indian use of said lands. Id at 1254-55. However, the Court went on to conclude that the Crow Tribe lost the power to exclude, and with it the power to regulate, as a result of the passage of the General Allotment Act of 1887 and the Crow Allotment Act of 1920, 41 Stat. 751 (1920).[13] Id. at 1255.

As to the second source of tribal authority, the Montana Court concluded that:

> [E]xercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. Since regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations, the general principles of retained inherent sovereignty did not authorize the Crow Tribe to adopt [such hunting and fishing regulations].

[13] The Crow Allotment Act of 1920, 41 Stat. 751, and the Allotment Acts of 1899, 30 Stat. 1362, and 1906, 34 Stat. 124, were a part of the special Allotment Acts Congress passed pursuant to the policy underlying the General Allotment Act of 1887, 24 Stat. 388. See Montana, 101 S. Ct. at 1255 n.8. The Crow Allotment ct affected the Crow Tribe, while the Allotment Acts of 1899 and 1906 affected the Lower Brule Sioux Tribe.

Id at 1258 (citations omitted). The Court did set forth two exceptions to this general principle against tribal authority over nonmember Indians in the civil regulatory arena. Id First, " [a] tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements," Id. Second, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id

As to the second Montana exception, a controversy has emerged as to whether the more rigid application set forth in Brendale should govern in the context of hunting and fishing regulation. See Bourland IV, 39 F.3d at 870 n.4.

The issue addressed in Brendale concerned the Yakima Indian Nation's authority to impose zoning and land use laws on fee lands owned by non-Indians within the Yakima Reservation. Brendale, 109 S. Ct. at 3000-01. Both lower courts and the Supreme Court treated the Yakima Reservation as divided into a "closed area" and an "open area." Id at 3000. The closed area was described as a pristine wilderness area, closed to the general public, and largely restricted to enrolled members of the Yakima Tribe. Id at 3000-01, 3012, 3016. Of the 807,000 acres comprising the closed area, only 25,OOO acres were held in fee. Id at 3000. By contrast, the open area contained unrestricted access and approximately one-half of the land was held in fee. Id The Supreme Court ultimately concluded that the Yakima Nation could exclusively zone member and nonmember fee lands within the closed area,

but lacked the authority to zone nonmember fee lands within the open area. Id at 3007-09.[14]

In the plurality opinion by Justice White, a more stringent standard was adopted for the second Montana exception. According to Justice White, in order for an Indian tribe to retain jurisdiction over non-Indians pursuant to the second Montana exception, " [t]he impact [on tribal interests] must be *demonstrably serious* and must imperil the political integrity, the economic security, or the health and welfare of the tribe." Brendale, 109 S. Ct. at 3008 (emphasis added). Justice White reasoned that this heightened standard "will sufficiently protect Indian tribes while at the same time avoiding undue interference with state sovereignty and providing the certainty needed by property owners." Id

Although the Supreme Court's decision in Bourland III is instructive as to the regulation of hunting and fishing by non-Indians on taken area lands, it logically would provide guidance in all land alienation cases including fee land cases, since the Bourland III Court ultimately applied "Montana's

[14] Interestingly, Justice White noted in Brendale that even if a tribe demonstrates facts in support of the second Montana exception, the state would only be required to respect the tribal interest in exercising the state's authority. Brendale, 109 S. Ct. at 3008. The tribe's only remedy would be to seek injunctive relief since the tribe would not be entitled to exercise direct authority over nonmember Indians. Id This conclusion is premised on Justice White's reading of Montana to stand for the proposition that, "[t]he governing principle is that the tribe has no authority itself, by way of tribal ordinance or action in the tribal courts, to regulate the use of fee land." Id.

framework for examining the 'effect of the land alienation."[15] Bourland III, 113 S. Ct. at 2318. According to Bourland III,

> Montana and Brendale establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case [open rather than closed lands], implies the loss of regulatory jurisdiction over the use of the land by others.

Id at 2316. This synopsis appears to suggest that Brendale and its modification to the second Montana exception is applicable in the resolution of cases involving the regulation of hunting and fishing rights.[16] However, this Court is somewhat troubled by the fact that in its discussion of the two Montana exceptions, the Supreme Court in Bourland III failed to provide a citation to the Brendale decision, or even acknowledge the possible mod)fication of the second Montana exception. On remand, the Eighth Circuit Court of Appeals did not apply Brendale in the context of hunting and fishing regulations, but concluded that the issue did not need to be

[15] A close scrutiny of Bourland III's case history discloses that regulation of fee lands was also at issue in the early stages of the litigation. In Bourland II, 949 F.2d 984 (8th Cir. 1991), the Eighth Circuit Court of Appeals noted that the tribe did not appeal "the portion of the District Court's opinion holding that they do not have the authority to regulate non-Indian hunting and fishing on non-Indian fee land. " Id at 989 n.11. The Eighth Circuit went on to cite Montana for the proposition that "the right of the Tribe to regulate non-Indian hunting and fishing on fee land acquired by non-Indians pursuant to the allotment policy has been abrogated by Congress." Id at 990 (citing Montana, 450 U.S. at 559, 101 S. Ct. at 1255).

[16] Furthermore, there appears to be little merit in distinguishing Brendale on the basis that it was a zoning law case, in light of the fact that zoning/land use regulation and hunting/fishing regulation are both in the nature of civil regulation requiring the same Montana analysis.

resolved in light of the fact that the district court had already found against the tribe when it had applied the less rigid Montana standard. Bourland IV, 39 F.3d at 870 n.4. Since the issues in this case may also be resolved under the less stringent second Montana exception, this Court also need not apply the more stringent standard set forth in Brendale to the facts presented in this case.[17]

Bourland III, Brendale. and Montana form the analytical framework for the Court's resolution of the issues in this case pertaining to jurisdiction over nonmember Indians and non-Indians on lands and waters owned in fee by any person or entity not a member of the Tribe within the boundaries of the Reservation.

2. Treaty Rights

Bourland III, Brendale, and Montana establish that any treaty rights obtained by the Lower Brule Sioux Tribe under the Fort Laramie Treaty of 1868 were abrogated with the passage of the General Allotment Act of 1887. 18

Therefore, the Court's analysis must turn to the general principles of retained inherent sovereignty as the second source of tribal authority.

[17] Perhaps Justice White's instruction as to the second Montana exception is more in the nature of a cue as to what a tribe is required to establish in order to fall within the protection of the second Montana exception, rather than a major alteration to the exception. This Court's interpretation of Justice White's Brendale modification, if indeed it is a modification, is hardly the last word on the subject. This Court might be better advised to avoid Brendale altogether.

[18] See also Allotment Acts of 1899, 30 Stat. 1362, and 1906, 34 Stat. 124 (effecting the Lower Brule Tribe, a part of the special Allotment Acts Congress passed pursuant to the policy underlying the General Allotment Act of 1887, 24 Stat. 388).

3. Inherent Sovereignty

The Court has not been made aware of any express congressional delegation of authority granting the Tribe the right to regulate hunting and fishing by nonmember Indians or non-Indians on fee lands. If such authority exists it must be found in the inherent authority of the Tribe. Montana, 101 S. Ct. at 1258. Indeed, this inherent tribal authority can be asserted if the Tribe can establish that either of the two Montana exceptions have been satisfied.

a. The First Montana Exception

As previously set forth, under the first Montana exception, "[a] tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Montana, 101 S. Ct. at 1258. In asserting that a consensual relationship does exist, the Tribe focuses on the original sale of land to nonmember Indians. According to the Tribe, the sale of land to a nonmember on the Reservation carried with it certain privileges and responsibilities to the remainder of the Reservation, and upon purchasing the Reservation land the nonmember consented to respect and abide by the tribal laws that protected important tribal interests in wildlife. The Court is not persuaded. Both Montana and Bourland III dictate a contrary conclusion. In Montana, the Supreme Court determined that "[n]on-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction." Id at 1259. In Bourland IV, the Eighth Circuit Court of Appeals came to the same conclusion when it agreed with the district court that in the context of hunting and fishing regulation, the first Montana exception is not relevant. Bourland IV, 39 F.3d at 869. The purchase of a hunting or fishing license does not give rise to a consensual relationship between the purchaser and the Tribe. Therefore, this Court finds that the first Montana exception which permits

tribal regulation pursuant to consensual relationships entered into with an Indian tribe or its members has not been satisfied.

b. The Second Montana Exception

As originally set forth by the Montana Court, "[a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Montana, 101 S. Ct. at 1258. The Tribe contends that State regulation of hunting and fishing on nonmember fee lands and waters within the Reservation boundaries adversely affects the Tribe in the following ways: (1) it deprives the Tribe of job opportunities for its members employed to provide regulatory functions; (2) it results in lost revenues from licensing; (3) in some instances, harvesting of deer on fee lands adversely affects game populations on trust lands; and (4) it creates confusion and discourages use of the Reservation due to the presence of a second governmental entity to enforce a separate set of laws. See Tribe's Second Response to State's Statement of Material Facts ¶¶ 30, 62, 63, 64, 84. The Court notes that to a certain extent all of these adverse effects were present in either or both Montana and Bourland III, and the adverse impact or harm cause thereby was insufficient to trigger the second exception. However, in order for this Court to determine whether the nonmember conduct is of sufficient magnitude to satisfy the second Montana exception, the Court undertakes a particularized inquiry into the unique facts and circumstances surrounding the Lower Brule Reservation and the Lower Brule Sioux Tribe. See Brendale, 109 S. Ct. at 3007. The Tribe's individual history, the demographic evidence of population, population mix, and respective economic mission of the Reservation are all factors which will affect this inquiry.

Both the State and the Tribe seek to derive income from non-Indians and nonmember Indians through fees and licenses

arising from hunting and fishing on the fee lands and waters; however, approximately only nine cents of every dollar spent by sportsmen on the Reservation is actually derived from license fees. Furthermore, whether the Tribe or the State collects the license fees, a sign)ficant portion of the revenue is and should be reinvested into wildlife restoration and management on the Reservation. The substantial year-round revenue derived from nonconsumptive recreation associated with wildlife and the job opportunities created by these nonconsumptive activities are of greater sign)ficance to the tribal economy then the license fees and job opportunity provided by regulatory functions. In addition, the financial strength of the Tribe has been greatly improved by the introduction of gaming and the accompanying casinos onto the Reservation. Any loss of license revenue and job opportunity relating to regulatory functions does not threaten "the political integrity, the economic security, or the health or welfare of the tribe." Montana, 101 S. Ct. at 1258.

The Tribe's third contention that the harvesting of deer on nonmember fee lands adversely affects game populations on certain trust lands was described by the Eighth Circuit Court of Appeals as "undeniably . . . vexatious to the individual Indians affected, but . . . [does] not amount to a direct effect on . . . the [Cheyenne River Sioux] Tribe as a whole." Bourland IV, 39 F.3d at 870. This conclusion was premised on the district court's finding that "non-Indian deer hunting 'on the taken area and the nonmember fee lands does reduce the amount of deer available to tribal members,' but ' does not decrease subsistence hunting by members as few deer are harvested by members for subsistence purposes."' Id. (quoting South Dakota v. Ducheneaux, Civil No. 88-3049, 1990 WL 605077, slip op. at 11 (D.S.D. 1990)) (Bourland I).[19]

[19]The case was originally filed against Ducheneaux, chairman of the Cheyenne River Sioux Tribal Council. Bourland's name was substituted when he became chairman.

Of the 235,800 acres within the Reservation boundaries, 56,634 acres, approximately one-quarter of the Reservation are deeded lands held in fee. Wildlife herds such as deer do migrate from and across fee lands, trust lands, tribal lands, and allotted lands. It is therefore obvious that nonmember deer hunting on nonmember fee lands will to a certain extent reduce the overall deer population on the Reservation, including the trust lands. However, as was the case in Bourland I, the Tribe has made no showing that a sign)ficant portion of the 1,035 resident Indians depend on venison, or upon any other type of wild game, for subsistence purposes. Therefore, this Court concludes that the harvesting of deer on nonmember fee lands in no way threatens "the political integrity, the economic security, or the health or welfare of the tribe." Montana, 101 S. Ct. at 1258.

The Tribe's final contention is that State regulation of hunting and fishing on nonmember fee lands and waters creates confusion and discourages use of the Reservation due to the presence of a second governmental entity to enforce a separate set of laws. To be sure, the boundaries between fee lands, trust lands, tribal lands, and allotted lands are not marked by boundary markers, making it difficult for persons entering and hunting upon the Reservation to determine the ownership of the checkerboard tracts of land. However, the Supreme Court in Montana, Brendale, and Bourland III "authorized such 'checkerboard' jurisdiction by mandating that neighboring tracts of land be subject to different regulatory authorities on the basis of the type of ownership, or the nature, of the land. This mandated 'checkerboarding' has been in effect now for at least [fifteen years]; if it is a problem that needs fixing, the remedy lies with Congress, not the courts." Bourland II, 949 F.2d at 996.

The Court recognizes the Tribe's history of wildlife regulation which includes the Tribe's adoption of the Wildlife Management Code of 1982, which was installed to provide for the management and control of wildlife, fishery, and outdoor

recreation resources of the Reservation. Although the Game and Fish Management Code of 1961 did recognize that non-Indians should abide by State laws, the Tribe contends that under the 1982 Code, State laws were presumed to be inapplicable within the Reservation boundaries. The Tribe has not enforced its regulations on the Missouri River during the period of the 1986 agreement with the State, however, prior to the 1986 agreement the Tribe did require a tribal hunting license. Based on this history of regulation, the Court finds that unlike the Crow Tribe in Montana, the Lower Brule Sioux Tribe has not "traditionally accommodated itself to the State's 'near exclusive' regulation of hunting and fishing on fee lands within the reservation." ~ Montana, 101 S. Ct. at 1259. However, in Bourland IV, the Cheyenne River Sioux Tribe's history of regulation and nonacquiescence to State assertion of jurisdiction did not justify a determination that the second Montana exception had been satisfied. Bourland IV, 39 F.3d at 872 (Heaney, J. dissenting) (quoting Bourland I, 1990 WL 605077, slip op. at 9-10) (focusing on the Cheyenne River Sioux Tribe's regulatory history)).

The successful implementation of the Wildlife Management Code, the protection of tribal hunting and fishing interests, and the overall management of wildlife on the Reservation, is not dependent upon the Tribe's ability to regulate nonmember hunting and fishing activities on nonmember fee lands and waters. Although the Tribe has convinced this Court that the State's wildlife management and game enhancement programs on the Reservation are heavily subsidized by the federal government, there has been no showing "that the State has abdicated or abused its responsibility for protecting and managing wildlife." Montana, 101 S. Ct. at 1259 n.16. Furthermore, the Tribe still retains jurisdiction over its members, as well as jurisdiction over the 119,900 acres in Indian ownership.

The Court finds that State regulation of nonmember and non-Indian hunting and fishing does not threaten "the political

integrity, the economic security, or the health or welfare of the tribe." Id. at 1258. The second Montana exception has not been met.

4. State Jurisdiction

The Bourland III Court did not address the issue of state jurisdictional authority in light of the fact that "the State [had] sought only a judicial determination regarding the [Cheyenne River Sioux] Tribe's claim to regulatory jurisdiction." Bourland III, 113 S. Ct. at 2318 n. 12; see also Bourland IV, 39 F.3d at 870 n.6. However, in this case the Tribe in its complaint has set forth that it is seeking a declaration "concerning the legal rights of the parties as to their respective authority to enforce their laws with the exterior boundaries of the Reservation." Tribe's Complaint at 11. The State in its answer filed on November 25, 1991, requested this Court to enter an Order and Judgment "[d]eclaring that the State has exclusive jurisdiction to regulate hunting and fishing by non-Indians and non-member Indians on reservation lands (and overlying waters)." State's Answer at 5. Furthermore, the State in its motion for summary judgment filed on September 11, 1995, framed the issues in terms of exclusive State jurisdiction. Therefore, the issue pertaining to the State's authority to assert its hunting and fishing laws on both nonmember fee and taken area lands and waters within the Reservation boundaries is properly before this Court.

The Supreme Court recognized that "[l]ong ago the Court departed from Mr. Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries." White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141, 100 S. Ct. 2578, 2582, 65 L. Ed. 2d 665 (1980) (quoting Worcester v. Georgia, 6 Pet. 515, 561, 8 L. Ed. 483 (1832)). In order for a district court to make a determination concerning the State's authority to enforce its hunting and fishing laws within the borders of a reservation, the court must apply and analyze two independent but related doctrines. First,

the doctrine of federal preemption. Bracker, 100 S. Ct. at 2583 (citing McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 172, 93 S. Ct. 1257, 1262, 36 L. Ed. 2d 129 (1973)). Second, the doctrine of tribal self-government which pertains to "the right of reservation Indians to make their own laws and be ruled by them." Bracker, 100 S. Ct. at 2583 (quoting Williams v. Lee, 358 U.S. 217, 220, 79 S. Ct. 269, 271, 3 L. Ed. 2d 251 (1959)). The two doctrines are independent in that standing alone, either can form the basis for denying a state the authority to regulate activity within a reservation. I'L They are related in the sense that "tribal self-government is ultimately dependent on and subject to the broad power of Congress" and "traditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop' . . . against which vague or ambiguous federal enactments must always be measured." Id

As previously set forth in this Court's analysis of inherent tribal sovereignty, the Montana court stated that the "regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations." Montana, 101 S. Ct. at 1258. This Court has also endeavored to undertake an extensive analysis concerning the two Montana exceptions, in which it has determined that under the facts and circumstances surrounding this Tribe and Reservation, neither exception has been satisfied. The Court therefore concludes that the doctrine of tribal self-government standing alone does not preclude the State from exercising its jurisdictional authority over nonmember Indians on nonmember fee lands and waters within the Reservation boundaries. Even so, the doctrine of tribal self-government does remain and will be considered as an important "backdrop" in the Court's federal preemption analysis.

In Bracker, the Supreme Court instructed that,

> When on-reservation conduct involving only Indians is at issue, state law is generally inapplicable, for the State's regulatory interest is likely to be minimal and the federal interest in encouraging tribal self-government is at its strongest. More difficult questions arise where, as here, a State asserts authority over the conduct of non-Indians engaging in activity on the reservation. In such cases we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Bracker, 100 S. Ct. at 2584 (citations omitted). Bourland III, Brendale, and Montana establish that certain treaty rights held by the Lower Brule Sioux Tribe under the Fort Laramie Treaty of 1868, 15 Stat. 649, were abrogated with the passage of the General Allotment Act of 1887, 24 Stat. 388.[20] With this in mind, the Court will proceed to balance the federal, state, and tribal interests as they relate to the regulation of nonmember fee lands and waters within the Reservation boundaries.

[20] See also Allotment Acts of 1899, 30 Stat. 1362, and 1906, 34 Stat. 124 (effecting the Lower Brule Tribe, a part of the special Allotment Acts Congress passed pursuant to the policy underlying the General Allotment Act of 1887, 24 Stat. 388).

The federal government has provided economic support to both the State and the Tribe through federally funded programs aimed at the overall management and enhancement of wildlife on the Reservation. Stemming from this aid, the federal government naturally has an interest in the successful regulation of wildlife on the Reservation. Although Congress has the power to regulate hunting and fishing within the fee areas, it has chosen a different course. The Tribe cites Bracker for the proposition that this Court should infer from the federal government's financial support that the federal government has undertaken a comprehensive regulation of hunting and fishing as to preempt State regulation.[21] The Tribe's contention is misplaced.

In Bracker, the Supreme Court held that the federal government's regulation of the harvesting of Indian timber was comprehensive and therefore preempted state regulation. Bracker, 100 S. Ct. at 2584. The regulation of timber harvesting was found to take "the form of Acts of Congress, detailed regulations promulgated by the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs." Id As to the regulation of hunting and fishing on nonmember fee areas on the Lower Brule Reservation, there are no congressional acts, nor are there detailed regulations promulgated by the Secretary of the Interior. The federal

[21] The Tribe also relies on New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983), for the proposition that the Tribe's history of regulation is further evidence of a pervasive scheme acting to preempt State regulation. However, that case is distinguishable from the case at hand since it pertained only to the regulation of hunting and fishing by non-Indians on trust lands, as opposed to fee lands. Id. at 2384. In addition, this Court has already set forth that in Bourland IV the Cheyenne River Sioux Tribe's history of regulation and nonacquiescence to State assertion of jurisdiction did not justify a determination that the second Montana exception had been satisfied. See Bourland IV, 39 F.3d at 872 (Heaney, J. dissenting) (quoting (Bourland I, 1990 WL 605077, slip op. at 9-10) (focusing on the Cheyenne River Sioux Tribe's regulatory history)).

government does not comprehensively regulate nor does it enforce any hunting and fishing regulations within the fee areas, with the exception of certain laws pertaining to endangered species. The United States Fish and Wildlife Service simply lacks the workforce required to effectively regulate and enforce laws pertaining to hunting and fishing within the fee areas; therefore, the federal government must rely on another sovereign to preserve and protect its investment. As previously established, the Tribe has not been relegated such authority by Congress through treaties or statutes, nor does the Tribe retain jurisdiction from its inherent sovereignty. There is simply no overriding federal interest that would be frustrated by State regulation; rather, the federal interest of protecting its financial investment as well as its responsibility to the Indian people must and can only practicably be achieved through State regulation on the nonmember fee lands and waters.

As set forth by the Supreme Court, "notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians." McClanahan, 93 S. Ct. at 1262. Naturally, the State has an interest in assuring that nonmember Indians and non-Indians are subjected only to regulation by a government in which they may participate. Cf Boos v. Barry, 485 U.S. 312, 324, 108 S. Ct. 1157, 1165, 99 L. Ed. 2d 333 (1988). Typically, neither nonmember Indians nor non-Indians can vote in tribal council elections, participate in the tribal jury system, hold tribal office, or participate in the adoption of tribal hunting and fishing regulations. See Veronica L. Bowen, The Extent of Indian Regulatory Authority Over Non-Indians: South Dakota v. Bourland, 27 Creighton L. Rev. 605, 656 (1994) (citing Duro, 110 S. Ct. at 2061; Brendale, 109 S. Ct. at 3016; Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 194, 98 S. Ct. 1011, 1013, 55 L. Ed. 2d 209 (1978)). However, nonmember Indians and non-Indians, as well as member Indians, may all participate in State elections.

The Supreme Court has also recognized that "[a] State's regulatory interest will be particularly substantial if the State can point to off-reservation effects that necessitate state intervention." , 462 U.S. 324, 336, 103 S. Ct. 2378, 2388, 76 L. Ed. 2d 611 (1983) (citing Puyallup Tribe v. Washington Game Dep't, 433 U.S. 165, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977)). Although this Court has determined that the State has provided only minimal financial assistance to the management and enhancement of wildlife on the Reservation, it has invested a considerable amount of time and interest in implementing the funds provided by the federal government. In addition, wildlife within the fee areas migrate from and across the Reservation and State borders, thereby generating a State interest in preserving its natural resources.

As previously established, the successful implementation of the Wildlife Management Code, the protection of tribal hunting and fishing interests, and the overall management of wildlife on the Reservation, are not dependent upon the Tribe's ability to regulate nonmember hunting and fishing activities on nonmember fee lands and waters. Rather, in light of the fact that the Tribe does not retain jurisdiction over nonmembers on the nonmember fee areas, and the federal government does not maintain the resources necessary to undertake the regulation, the Tribal interests are dependent on the State's effective regulation of these fee areas. There has been no showing "that the State has abdicated or abused its responsibility for protecting and managing wildlife." Montana, 101 S. Ct. at 1259 n. 16. There is no conflict between State and Tribal laws as to nonmember Indians hunting and fishing on nonmember fee areas since it has already been established that the Tribe has no jurisdiction over said areas. Therefore, this Court does not believe that principles of federal Indian law, whether stated in terms of preemption, tribal self-government, or otherwise, preclude the State from lawfully exercising jurisdiction over nonmember Indians and non-Indians on the fee lands and waters.

In conclusion, the Court finds that no genuine issue of material fact exists, and the Tribe has failed to establish significant probative evidence to prevent summary judgment on the jurisdictional issue over nonmember fee lands and waters. See Lambert Plumbing, 934 F.2d at 979.

C. JURISDICTION OVER TAKEN AREA LANDS AND WATERS

The final issue before this Court pertains to jurisdiction over nonmember Indians and non-Indians on lands and waters located in the Fort Randall and Big Bend taken areas within the boundaries of the Reservation.

1. Legal Precedent

In Bourland III, the Supreme Court addressed the jurisdictional complexities surrounding taken area lands. In Bourland III, the Cheyenne River Sioux Tribe and its members had conveyed land to the United States under the Cheyenne River Taking Act, 68 Stat. 1191 (1954), for the construction of the Oahe Dam and Reservoir. 113 S. Ct. at 2313-14. The Bourland III Court relied on the framework established in Montana to examine the federal taking since "Montana [also] concerned an Indian tribe's power to regulate non-Indian hunting and fishing on lands located within a reservation but no longer owned by the tribe or its members. " Id at 2316, 2318.

As was the case in Montana and Brendale, the Bourland III Court in its analysis identified tribal treaty rights and inherent sovereignty as two sources of authority which could support a finding that a tribe had the power to regulate nonmember hunting and fishing on federal taken lands. Id. at 2316, 2319. As to the first source of authority, the Court ultimately concluded that "Congress, through the Flood Control and Cheyenne River Acts eliminated the Tribe's

power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe [pursuant to the Fort Laramie Treaty of 1868]." I~ at 2316-17. The Court premised this determination on the interpretation that the Flood Control Act of 1944 effectuated an opening of the lands taken for the Oahe Project for the general recreational use of the public, thereby abrogating any original treaty right to regulate non-Indian hunting and fishing within the federal taken areas. Id at 2317. The same conclusion can be derived as to the lands taken for the Big Bend and Fort Randall Projects, since the Flood Control Act of 1944 also effectuated an opening of the lands taken for said Projects. See 16 U.S.C. § 460(d). However, the Bourland III Court proceeded one step further, finding that even "[i]f the Flood Control Act leaves any doubt whether the Tribe retains its original treaty right to regulate non-Indian hunting and fishing on lands taken for federal water projects, the Cheyenne River Act extinguishes all such doubt." Id In its analysis of the Cheyenne River Act, the Court focused on two key provisions. First, the Act's declaration that the payments made to the Cheyenne River Sioux Tribe "shall be in final and complete settlement of all claims, rights, and demands" of the tribe, indicated that there was an understanding by both the tribe and the government that the Act included all of the terms and rights the tribe and its members would enjoy. Id (citing Cheyenne River Act, 68 Stat. 1191). Second, the Court analyzed section 10 of the Act which provided that,

> [T]he said Indian Tribe and the members thereof shall have the right to graze stock on the land between the level of the reservoir and the taking line .... The said Tribal Council and the members of said Indian Tribe shall have, without cost, the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

Cheyenne River Act, 68 Stat. 1193, § 10. The Supreme Court, in determining that this provision should not be construed to grant the tribe an additional right to regulate hunting and fishing by non-Indians, reasoned that "[i]f Congress had intended by this provision to grant the Tribe the additional right to regulate hunting and fishing, it would have done so by a similarly explicit statutory command." Id Based on the instruction provided in the Bourland III Court's interpretation of the Cheyenne River Act, this Court will proceed to analyze the language contained within the two taking acts at issue in this case.

2. Treaty Rights

Section 1 of the Fort Randall Taking Act, Pub. L. No. 85-923, 72 Stat. 1773, provides that the payments made to the Lower Brule Sioux Tribe shall be in "settlement of all claims, rights, and demands of said tribe." The Court construes this language to indicate that there was an understanding by both the Tribe and the government that the Act included all of the terms and rights the Tribe and its members would enjoy. Section 5 of the Act further provided that,

> [T]he said Indian tribe and the members thereof shall be given exclusive permission, without cost, to graze stock on the land between the water level of the reservoir and the exterior boundary of the taking area. The said tribal council and the members of said Indian tribe shall be permitted to have, without cost, access to the shoreline of the reservoir including permission to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

Fort Randall Taking Act, § 5. It is clear that this provision, which is almost identical to that in section 10 of the Cheyenne River Act, must be construed as depriving the Tribe of any treaty right to regulate non-Indian hunting and fishing

within the Fort Randall taken area. See Bourland III, 113 S.Ct., at 2317.

This Court reaches the same conclusion as to the Big Bend Taking Act, Pub. L. No. 87734, 76 Stat. 698. The Act's declaration that the payments made to the Tribe "shall be in settlement of all claims, rights, and demands of the tribe and individual Indians arising out of the taking under this Act" indicates that there was an understanding by both the Tribe and the government that the Act included all of the terms and rights the Tribe and its members would enjoy. See Big Bend Taking Act, § 1(a)(2). Section 10 of the Big Bend Taking Act provides that,

> The tribe and members thereof shall have without cost the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

Big Bend Taking Act, § 10. This Court finds that this provision must also be construed as depriving the Tribe of any treaty right to regulate non-Indian hunting and fishing within the Big Bend taken area, in light of the Supreme Court's reasoning that "[i]f Congress had intended by this provision to grant the Tribe the additional right to regulate hunting and fishing, it would have done so by a similarly explicit statutory command." Bourland III, 113 S. Ct. at 2317. Therefore, this Court concludes that Congress, through the Flood Control Act of 1944 and the Fort Randall and Big Bend Taking Acts, eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe pursuant to the Fort Laramie Treaty of 1868. Id. at 2316-17.

3. Inherent Sovereignty

Having concluded that the Tribe does not derive any authority to regulate nonmember and non-Indians hunting and fishing within the taken areas from any relevant treaty rights, the Court's analysis must focus on the general principles of retained inherent sovereignty as the second source of tribal authority. Since the Court is unaware of any express congressional delegation of authority to the Tribe pertaining to the regulation of hunting and fishing as to nonmember Indians or non-Indians within the taken areas, the Court's analysis must proceed under the general principle against tribal authority over nonmember Indians in the context of civil regulatory jurisdiction. Bourland III, 113 S. Ct. at 2320 (citing Montana, 101 S. Ct. at 1258). This principle against tribal authority can be overcome if the Tribe can establish that either of the two Montana exceptions have been satisfied.

a. The First Montana Exception

As previously set forth, under the first Montana exception, " [a] tribe may regulate . . . the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Montana, 101 S. Ct. at 1258. The Tribe contends that this first exception has been satisfied since Congress's grant of public access to an area within the boundaries of the Reservation created an implied obligation by each member of the public to be respectful of the property interests that both the Tribe and the Corps have within and around the taken areas. The Tribe further asserts that as a result of the interest in the hunting and fishing assets that it has developed, nurtured, and protected, as well as an interest in the continued grazing of livestock, that the public has in effect contracted to refrain from activities that would diminish the value of those assets.

As was the case with the nonmember fee areas, this Court is of the opinion that both Montana and Bourland IV dictate a contrary conclusion. In Montana, the Supreme Court concluded that "[n]on-Indian hunters and fishermen on non-Indian fee land do not enter any agreements or dealings with the Crow Tribe so as to subject themselves to tribal civil jurisdiction." Montana, 101 S. Ct. at 1259. It is also clear that nonmember sportsmen hunting and fishing within the taken areas at issue in this case do not enter into the type of agreement or dealing necessary to trigger implication of the first Montana exception. Furthermore, in Bourland IV, the Eighth Circuit Court of Appeals on remand came to the same conclusion as to the taken area on the Cheyenne River Sioux Reservation when it agreed with the district court that in the context of hunting and fishing regulation the first Montana exception is not relevant. Bourland IV, 39 F.3d at 869. Therefore, this Court finds that the first Montana exception which permits tribal regulation pursuant to consensual relationships entered into with an Indian tribe or its members has not been satisfied as to the Big Bend and Fort Randall taken areas.

b. The Second Montana Exception

Finally, the Court must undertake an analysis of the second Montana exception as it pertains to the taken areas. As was the case with fee lands and waters, the Tribe contends that State regulation of hunting and fishing within the taken areas adversely affects the Tribe in the following ways: (1) it deprives the Tribe of job opportunities for its members employed to provide regulatory functions; (2) it results in lost revenues from licensing; (3) in some instances, harvesting of deer adversely affects game populations on trust lands; and (4) it creates confusion and discourages use of the Reservation due to the presence of a second governmental entity to enforce a separate set of laws. See Tribe's Second Response to State's Statement of Material Facts ¶¶ 30, 62, 63, 64, 84. For the same reasons previously set forth in the fee areas analysis,

State regulation of nonmember and non-Indian hunting and fishing within the taken areas and the resulting effects simply do not threaten or constitute a sufficient adverse effect on "the political integrity, the economic security, or the health or welfare of the tribe." Montana, 101 S. Ct. at 1258.

4. State Jurisdiction

Having determined that the Tribe does not have the inherent authority to regulate nonmember and non-Indian hunting and fishing within the taken areas, the Court must next address the issue of whether the State has jurisdiction to regulate these activities. State jurisdiction may be precluded pursuant to the federal preemption doctrine or the doctrine of tribal self-government. Bracker, 100 S. Ct. at 2583. Standing alone, the doctrine of tribal self-government does not foreclose State regulation given the fact that the "regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations." Montana, 101 S. Ct. at 1258. However, the doctrine of tribal self-government does remain and will be considered as an important "backdrop" in the Court's federal preemption analysis.

It is clear that Congress provided the Army Corps of Engineers with the regulatory control over the taken areas at issue in this case. 16 U.S.C. § 460d; see also Bourland III, 113 S. Ct. at 2317, 2320. Therefore, this Court must ultimately resolve two matters. First, the Court must determine whether the Corps has the ability to entrust the State with the regulation of hunting and fishing by non-Indians and nonmember Indians in the taken areas. If the Corps has the authority to relegate partial jurisdiction over the taken areas, the second issue is whether it has in fact relegated jurisdiction to the State. To aid in the resolution of these matters, as instructed by Bracker, the Court examines the language of relevant federal treaties and statutes, and undertakes "a particularized inquiry into the nature of the state, federal, and

tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law." Bracker, 100 S. Ct. at 2583.

From the language of the Flood Control Act of 1944, which effectuated the opening of the lands for the Big Bend and Fort Randall Projects, State law has not been preempted. As set forth in the Act, "[n]o use of any area to which [the Flood Control Act] applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated." See 16 U.S.C. § 460d. Furthermore, both the Big Bend Taking Act and the Fort Randall Taking Act grant tribal members permission to hunt and fish within the taken areas, "subject, however, to regulations governing the corresponding use by other citizens of the United States." Fort Randall Taking Act, §5;BigBendTaking Act, § 10. Not only does this language act to deprive the Tribe of any treaty right to regulate non-Indian hunting and fishing within the taken areas, but it recognizes that other regulations will or at least may be in effect. See Bourland III, 113 S. Ct. at 2317. The only logical interpretation of the other governing regulation language is that Congress anticipated that the federal government would rely heavily upon State regulation, given the fact that there are no comprehensive federal hunting and fishing regulations in effect for the taken areas.

The consistent federal administrative position favors State regulation over nonmember Indians and non-Indians within the taken areas. On March 9, 1976, Colonel Russell A. Glenn, Corps of Engineers, issued a letter to Lower Brule Chairman Mike Jandreau stating:

c. That lands purchased and/or condemned by the United States for the Ft. Randall and Big Bend Projects were returned to the public domain, and, as such, fall within the civil and criminal, or legislative jurisdiction of the State of South Dakota.

d. That the fish and game laws of the State of South Dakota are the only such laws that apply to these areas which were formerly owned by the Lower Brule Sioux Tribe and its members.

Letter from Colonel Russell A. Glenn, District Engineer for the Corps of Engineers, to Tribal Chairman Michael B. Jandreau of the Lower Brule Reservation at 5 (concerning the Tribe's attempts at enforcing tribal regulations within the taken areas). On September 15, 1986, Colonel Steven G. West, Corps of Engineers, reiterated the Corps' position as to jurisdiction over the taken areas, by setting forth that:

> The position of the Omaha District, as well as the State of South Dakota, has always been that regulation of hunting and fishing on Corps project lands in South Dakota is a matter of state law. This was clearly the intent of Section 4 of the 1944 Flood Control Act, 16 U.S.C. § 460d. As you know, the Corps has only proprietorial jurisdiction over its project lands along the mainstem of the Missouri River in South Dakota. Such lands remain subject to state civil and criminal jurisdiction.[22]

[22] The Corps of Engineers has taken the same position with regard to the public. In its May 1986 Guide entitled "Boating and Recreation," at sheet 1 of 8 n.9, the Corps set forth that:

> Hunting and fishing is allowed on the lake and project land in accordance with the rules and regulations established by the South Dakota Department of Game, Fish and Parks and the U.S. Fish and Wildlife Service. These regulations may change annually, so hunters and fishermen are advised to review current regulations before engaging in these forms of recreation.

Letter from Colonel Steven G. West, District Engineer for the Corps of Engineers, to Secretary Jeff Stingley of the South Dakota Department of Game, Fish and Parks at 1 (concerning gill netting on mainstream reservoirs and the application of the Eighth Circuit Court of Appeals decision of Lower Brule Sioux Tribe v. South Dakota, 711 F.2d 809 (8th Cir. 1983)).

The federal government's position on State jurisdiction was also expressed to the Senate Select Committee on Indian Affairs by John Velehradsky, the Chief of the Planning Division of the Missouri River Division, in the following manner:

> Senator, it is my understanding that, in this instance, we would rely on the State agencies for jurisdiction over the enforcement of laws on those areas. The United States or the Corps of Engineers has no jurisdiction in terms of enforcement within the project. We rely on the State agencies .... We have jurisdiction over the land, but in terms of enforcing State game laws, we do not have any jurisdiction over State game laws.

U.S. Senate Hearing 100-500, (Nov. 19, 1987) (emphasis added).

Finally, the rules and regulations governing public use of Corps of Engineers water resources development projects likewise provide for the application of State laws. As set forth by 36 C.F.R. § 327.8,

> Hunting, fishing, and trapping are permitted except in areas where prohibited by the District Engineer. All Federal, state and local laws governing these activities apply on project lands and waters, as regulated by authorized enforcement officials.

36 C.F.R. § 327.8 (1995) (emphasis added). The rules and regulation further provide that,

> Except as otherwise provided herein or by Federal law or regulation, state and local laws and ordinances shall apply on project lands and waters. This includes, but is not limited to, state and local laws and ordinances governing:
>
> > (a) Operation and use of motor vehicles, vessels, and aircraft; (b) Hunting, fishing and trapping....
>
> These state and local laws and ordinances are enforced by those state and local enforcement agencies established and authorized for that purpose.

36 C.F.R. § 327.26 (1995) (emphasis added). Although Bourland III did not resolve the issue of State jurisdiction over the taken area within the Cheyenne River Sioux Reservation, the Court provided an important interpretation of the phrase "local laws. " Bourland III, 113 S. Ct. at 2321 n.16. The Bourland III Court read "an Army Corps regulation outlining the procedures for evaluating Department of the Army water use permit applications, [to indicate] that the Army Corps, in fact, distinguishes between the terms 'tribal' and 'local."' Id (citing 33 C.F.R. § 320.4(j)(2) ("The primary responsibility for determining zoning and land use matters rests with state, local and tribal governments."). Therefore, this Court finds that the Army Corps of Engineers has the ability to and in fact has relegated partial jurisdiction to the State over nonmember Indians and non-Indians within the Fort Randall and Big Bend taken areas.

The federal government has an interest in preserving the financial contributions it has made to wildlife development in the taken areas, as well as the fee areas. The federal government does not have in place a comprehensive regulatory scheme, nor does it have the workforce available on the

Reservation to effectively police hunting and fishing by nonmember Indians within the taken areas. This is precisely why the Corps of Engineers has entrusted the State to undertake the regulation of hunting and fishing by nonmembers within said areas. As is the case with the fee areas, the State has a legitimate interest in assuring that nonmember Indians and non-Indians are subjected only to regulation by a government in which they may participate. The successful implementation of the Wildlife Management Code, the protection of tribal hunting and fishing interests, and the overall management of wildlife on the Reservation, are not dependent upon the Tribe's ability to regulate nonmember hunting and fishing activities within the taken areas. Rather, in light of the fact that the Tribe does not retain jurisdiction over the taken areas, and the federal government does not maintain the resources necessary to undertake the regulation, the tribal interests are dependent on the State's effective regulation of said areas. There has simply been no showing "that the State has abdicated or abused its responsibility for protecting and managing wildlife" in the taken areas. Montana, 101 S. Ct. at 1259 n.16. Furthermore, there is no conflict between State and Tribal laws as to nonmember Indians and non-Indians within the taken areas since it has already been established that the Tribe does not have jurisdiction over these areas. Therefore, this Court does not believe that principles of federal Indian law, whether stated in terms of preemption, tribal self-government, or otherwise, preclude the State from lawfully exercising jurisdiction over nonmember Indians and non-Indians within the taken areas.

In conclusion, the Court finds that no genuine issue of material fact exists, and the Tribe has failed to established sign)ficant probative evidence to prevent summary judgment on the jurisdiction issue over the taken area lands and waters. See Lambert Plumbing, 934 F.2d at 979.

CONCLUSION

Based on the above analysis, the Court concludes there is no distinction between nonmember Indians and non-Indians in the regulation of hunting and fishing within the boundaries of the Reservation. The Court further finds that based on the analytical framework provided by Bourland III, Brendale, and Montana, any treaty rights that would provide the Lower Brule Sioux Tribe with the authority to regulate nonmember and non-Indian hunting and fishing on nonmember fee lands and waters or within the taken areas have been abrogated. The Court further finds that as to inherent tribal sovereignty, nonmembers and non-Indians have not entered into a consensual relationship with the Tribe or its members as to satisfy the first Montana exception, nor would State regulation of nonmembers and non-Indians threaten or sufficiently affect "the political integrity, the economic security, or the health or welfare of the tribe" as to satisfy the second Montana exception. Montana, 101 S. Ct. at 1258. Finally, this Court concludes that the State has jurisdiction to regulate nonmember and non-Indian hunting and fishing within both the fee and taken areas at issue in this case. A judgment shall issue forthwith.

Dated this 8th day of February, 1996.

BY THE COURT:

_____

RICHARD H. BATTEY
CHIEF JUDGE

ATTEST:
JOSEPH A. HAAS, CLERK

By:_____
Deputy Clerk

APPENDIX C - ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED MARCH 5, 1997

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-1692SDRC	)	
	)	Order Denying Petition for
Lower Brule Sioux Tribe,	)	Rehearing and Suggestion
	)	for Rehearing En Banc
Appellant,	)	
vs .	)	
	)	
State of South Dakota; John Cooper, Secretary, Division of Game, Fish & Parks for the State of South Dakota,	)	
	)	
	)	
Appellees.	)	

The suggestion for rehearing en bane is denied. Judge McMillian, Judge Beam, and Judge Murphy would grant the suggestion.

The petition for rehearing by the panel is also denied.

March 5, 1997

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX D - UNITED STATES CONSTITUTION
ARTICLE I § 8

Section 8. The Congress shall have Power To... provide for the common Defence and general Welfare of the United States...;

. . .

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

. . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Power vested by this Constitution in the Government of the United States or in any Department or Officer thereof.

ARTICLE VI CLAUSE 2

Clause 2. This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding.

TENTH AMENDMENT

APPENDIX C

[CHAPTER 665]

December 22, 1944
[H. R. 4485]
[Public Law 534]

AN ACT

Authorizing the construction of certain public works on rivers and harbors for flood control, and for other purposes.

Navigation and flood control. Declaration of policy.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, as herein authorized, it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

In conformity with this policy:

Submission of plans, reports, etc.

(a) Plans, proposals, or reports of the Chief of Engineers, War Department, for any works of improvement for navigation or flood control not heretofore or herein authorized, shall be

submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investigations which form the basis of any such plans, proposals, or reports shall be conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, oportunity to cooperate in the investigations. If such investigations in whole or part are concerned with the use or control of waters arising west of the ninety-seventh meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and

Interests of affected States.

Waters arising west of 97th meridian.

Representative for State.

"Affected State or States."

Coordination with other plans.

operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or proposals to the Congress shall set out therein, among other things, the relationship between the plans for construction and operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within ninety days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of War shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of War may prepare and make said transmittal any time following said ninety-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document.

Transmittal of proposed report to States, etc.

Views and recommendations.

Transmittal of proposed report to Congress.

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future,

Use of waters of western States for navigation.

in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

Irrigation works. Investigation and reports. Objection by affected State, etc.; effect. 53. Stat. 1193 43 U.S.C. § 485h(a). 54 Stat. 1120. 16 U.S.C. § 590z-1(a); Supp. III, § 590z 1 (a).

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of War, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of War. In the event a submission of views and recommendations, made by an affected State or by the Secretary of War pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and subsection 9 (a) of the Reclamation Project Act of 1939 (53 Stat. 1187) and subsection 3 (a) of the Act of August 11, 1939 (53 Stat. 1418), as amended, are hereby amended accordingly.

"Flood control." 49 Stat. 1570. 33 U.S.C. § 701a. Jurisdiction of Federal activities.

SEC. 2. That the words "flood control" as used in section 1 of the Act of June 22, 1936, shall be construed to include channel and major drainage improvements, and that hereafter Federal investigations and improvements of rivers and other waterways for flood control and allied purposes shall be under the jurisdiction of and shall be prosecuted by the War Department under the direction of the Secretary of War and supervision of the Chief of Engineers, and Federal investigations of watersheds and measures for run-off and water-flow

retardation and soil-erosion prevention on watersheds shall be under the jurisdiction of and shall be prosecuted by the Department of Agriculture under the direction of the Secretary of Agriculture, except as otherwise provided by Act of Congress.

State, etc., cooperation. 49 Stat. 1571; 52 Stat. 1215. 33 U.S.C. §§ 701c, 701c—1; Supp. III, § 701c note.

SEC. 3. That section 3 of the Act approved June 22, 1936 (Public, Numbered 738, Seventy-fourth Congress), as amended by section 2 of the Act approved June 28, 1938 (Public, Numbered 761, Seventy-fifth Congress), shall apply to all works authorized in this Act, except that for any channel improvement or channel rectification project provisions (a), (b), and (c) of section 3 of said Act of June 22, 1936, shall apply thereto, and except as otherwise provided by law: *Provided*, That the authorization for any flood-control project herein adopted requiring local cooperation shall expire five years from the date on which local interests are notified in writing by the War Department of the requirements of local cooperation, unless said interests shall within said time furnish assurances satisfactory to the Secretary of War that the required cooperation will be furnished.

Time limitation.

Recreational facilities in reservoir areas.

SEC. 4. The Chief of Engineers, under the supervision of the Secretary of War, is authorized to construct, maintain, and operate public park and recreational facilities in reservoir areas under the control of the War Department, and to permit the construction, maintenance, and operation of such facilities.

Leases.

The Secretary of War is authorized to grant leases of lands, including structure or facilities thereon, in reservoir areas for such periods and upon such terms as he may deem reasonable: *Provided*, That preference shall be given to Federal, State, or local governmental agencies,

Preference in granting of licenses.

and licenses may be granted without monetary consideration, to such agencies for the use of areas suitable for public park and recreational purposes, when the Secretary of War determines such action to be in the public interest. The water areas of all such reservoirs shall be open to public use generally, without charge, for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such water areas along the shores of such reservoirs shall be maintained for general public use, when such use is determined by the Secretary of War not to be contrary to the public interest, all under such rules and regulations as the Secretary of War may deem necessary. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received for leases or privileges shall be deposited in the treasury of the United States as miscellaneous receipts.

Public use of water areas.

Disposal of electric power; rates.

SEC. 5. Electric power and energy generated at reservoir projects under the control of the War Department and in the opinion of the Secretary of War not required in the operation of such projects shall be delivered to the Secretary of Interior, who shall transmit and dispose of such power and energy in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles, the rate schedules to become effective upon confirmation and approval by the Federal Power Commission. Rate schedules shall be drawn having regard to the recovery (upon the basis of the application of such rate schedules to the capacity of the electric facilities of the projects) of the cost of

producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years. Preference in the sale of such power and energy shall be given to public bodies and cooperatives. The Secretary of the Interior is authorized, from funds to be appropriated by the Congress, to construct or acquire, by purchase or other agreement, only such transmission lines and related facilities as may be necessary in order to make the power and energy generated at said projects available in wholesale quantities for sale on fair and reasonable terms and conditions to facilities owned by the Federal Government, public bodies, cooperatives,and privately owned companies. All moneys received from such sales shall be deposited in the Treasury of the United States as miscellaneous receipts.

Preference in sale of power.

SEC. 6. That the Secretary of War is authorized to make contracts with States, municipalities, private concerns, or individuals, at such prices and on such terms as he may deem reasonable, for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the War Department: *Provided*, That no contracts for such water shall adversely affect then existing lawful uses of such water. All moneys received from such contracts shall be deposited in the Treasury of the United States as miscellaneous receipts.

SEC. 7. Hereafter, it shall be the duty of the Secretary of War to prescribe regulations for the use of storage allocated for flood control or navigation at all reservoirs constructed wholly or in part with Federal funds provided on the basis of such purposes, and the

Regulations for use of storage at reservoirs.

operation of any such project shall be in accordance with such regulations: *Provided*, That this section shall not apply to the Tennessee Valley Authority, except that in case of danger from floods on the Lower Ohio and Mississippi Rivers the Tennessee Valley Authority is directed to regulate the release of water from the Tennessee River into the Ohio River in accordance with such instructions as may be issued by the War Department.

Applicability to TVA.

SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses

Additional irrigation works.

43 U.S.C. § 485a (a).

Ante, p. 279.

Prequisites.

Nonapplicability.

now existing: *Provided*, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

Approval of designated plans.

SEC. 9. (a) The general comprehensive plans set forth in House Document 475 and Senate Document 191, Seventy-eighth Congress, second session, as revised and coordinated by Senate Document 247, Seventy-eighth Congress, second session, are hereby approved and the initial stages recommended are hereby authorized and shall be prosecuted by the War Department and the Department of Interior as speedily as may be inconsistent with budgetary requirements.

Missouri River Basin.

52 Stat. 1218.

(b) The general comprehensive plan for flood control and other purposes in the Missouri River Basin approved by the Act of June 28, 1938, as modified by subsequent Acts, is hereby expanded to include the works referred to in paragraph (a) to be undertaken by the War Department; and said expanded plan shall be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers.

Reclamation and power developments.

43 U.S.C. §485a (a).

Ante, p. 279.

(c) Subject to the basin-wide findings and recommendations regarding the benefits, the allocations of costs and the repayments by water users, made in said House and Senate documents, the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), except that irrigation of Indian trust and tribal lands, and repayment therefor, shall be in accordance with the laws relating to Indian lands.

Additional sums authorized.

(d) In addition to previous authorizations there is hereby authorized to be appropriated the sum of $200,000,000 for the partial accomplishment of the works to be undertaken under said expanded plans by the Corps of Engineers.

(e) The sum of $200,000,000 is hereby authorized to be appropriated for the partial accomplishment of the works to be undertaken under said plans by the Secretary of the Interior.

Projects authorized.

SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein:

Preparation for post-war construction.

Provided, That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this Act to be constructed by the War Department during the war, with funds from appropriations heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction: *Provided further*, That when the existing critical situation with respect to materials, equipment, and manpower no longer exists, and in any event not later than immediately following the cessation of hostilities in the present war, the projects herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: *And provided further*, That penstocks and other similar

Initiation of projects.

Installation of penstocks.

facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the War Department when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission.

Supreme Court, U.S.
FILED
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(2)

No. 96-1928

In The

Supreme Court of the United States

October Term, 1997

LOWER BRULE SIOUX TRIBE,

Petitioner,

v.

STATE OF SOUTH DAKOTA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

MARK W. BARNETT
Attorney General
State of South Dakota
Counsel of Record

JOHN PATRICK GUHIN
Deputy Attorney General
CHARLES D. MCGUIGAN
Assistant Attorney General
500 E. Capitol Avenue
Pierre, SD 57501-5090
Telephone: (605) 773-3215
Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

28 pp

QUESTIONS PRESENTED

I. WHETHER SOUTH DAKOTA MAY EXERCISE JURISDICTION OVER NONMEMBER RECREATIONAL ACTIVITIES ON CORPS OF ENGINEER LANDS TAKEN FOR DAMS AND RESERVOIRS UNDER THE FLOOD CONTROL ACT OF 1944, CH. 665, 58 STAT. 887, WITHIN THE LOWER BRULE RESERVATION?

II. WHETHER THE *MONTANA* EXCEPTIONS REQUIRE CLARIFICATION AS APPLIED TO ACTIVITIES OF THE GENERAL PUBLIC WITHIN THE TAKEN AREAS OF THE LOWER BRULE SIOUX RESERVATION?

III. WHETHER THE *MONTANA* DECISION SHOULD APPLY TO FORMER ALLOTTED LANDS NOW OWNED IN FEE BY NON-INDIANS WITHIN THE EXTERIOR BOUNDARIES OF THE LOWER BRULE RESERVATION?

IV. WHETHER SUMMARY JUDGMENT IS APPROPRIATE FOR INDIAN JURISDICTION CASES?

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STATEMENT OF THE CASE

This case stems from an action brought by the Petitioner Lower Brule Sioux Tribe on August 4, 1980, almost 17 years ago, seeking to enjoin the State of South Dakota from enforcing its fish and wildlife regulations within the exterior boundaries of the Lower Brule Reservation. The district court initially determined that the reservation had been diminished by the acts of Congress which took land for the construction of two main stem dam and reservoirs on the Missouri River. *Lower Brule Sioux Tribe v. South Dakota*, 540 F.Supp. 246 (D.S.D. 1982). The United States Court of Appeals for the Eighth Circuit reversed and remanded the issue of whether the Tribe had jurisdiction over nonmembers within the "taken areas." *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809, 827 (8th Cir. 1983). Prior to the trial scheduled by the district court, the State and the Tribe entered into a five-year agreement and the case was dismissed.

1. At the end of the five-year agreement, on October 24, 1991, the Tribe brought the present action to preliminarily and permanently enjoin the State from enforcing its hunting and fishing laws within the exterior boundaries of the reservation over any persons, Indian or non-Indian, and seeking a determination that barred the State from exercising any hunting and fishing authority within the boundaries, whether on fee land, public land, or trust land. DCO App. 23a.[1] The district court held an evidentiary hearing on November 8, 1991, on the issue of

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[1] The term "App." refers to the Appendix filed as part of the Tribe's petition.

preliminary injunctive relief. DCO App. 24a. On November 13, 1991, the district court entered a preliminary injunction which continued, in some respects, the terms of the five-year agreement between the State and the Tribe.

Over the course of the next several years, both the State and the Tribe conducted extensive discovery. App. 3a. On September 11, 1995, the State filed a motion for summary judgment requesting the court to find that the State has exclusive jurisdiction over nonmember Indians and non-Indians hunting and fishing on the non-Indian fee lands and waters within the boundaries of the reservation and within the Fort Randall and Big Bend taken areas, as well as the lands and waters owned in fee by any nonmember Indian. DCO App. 25a; T.A. 10.[2]

The Tribe on January 15, 1996, submitted a response to State's Statement of Material Facts and a brief in opposition to the motion for summary judgment. T.A. 16. The district court thereafter entered an order granting the State's motion for summary judgment finding the State possessed exclusive hunting and fishing jurisdiction over all nonmembers on fee and public lands within the Lower Brule Reservation. DCO App. 20a-63a.

2. The court of appeals affirmed. App. 1a-19a. The majority affirmed the district court's granting of summary judgment and held that the State of South Dakota has exclusive regulatory jurisdiction over hunting and fishing by nonmembers on both nonmember-owned fee

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[2] The term "T.A." refers to the Tribal Appendix compiled in the Court of Appeals.

lands and the taken area within the Lower Brule Reservation. App. 15a. "We agree with the district court that under existing precedent summary judgment is appropriate to resolve this dispute." App. 6a.

The court of appeals then analyzed the Tribe's jurisdiction over fee lands and waters under its treaty rights, App. 7a-8a, and under notions of inherent sovereignty. App. 8a-11a. After an extensive analysis guided by this Court's decisions, the Court held "that the district court did not err in its determination that the Tribe failed to establish sufficient evidence to prevent summary judgment on the jurisdictional issue over nonmember-owned fee lands and waters." App. 11a. The Court found that since the Tribe no longer retained the exclusive use and benefit of the fee lands and could not exclude persons therefrom that it had lost regulatory jurisdiction over the use of the lands by others. App. 8a. The court of appeals then conducted a similar analysis for the lands and waters located in the Fort Randall and Big Bend taken areas within the boundaries of the reservation. App. 11a-14a.

3. The Tribe applied for rehearing and rehearing en banc. The core of the Tribe's argument was that summary judgment was not a proper procedure in a tribal jurisdiction dispute and that it should have gotten its day in court. Appellee's Petition for Rehearing with Suggestion for Rehearing En Banc, *Lower Brule Sioux Tribe v. State of South Dakota, et al.*, No. 96-1692. Rehearing was denied and of the eleven active judges, three would have granted rehearing en banc. App. 64a.

4. The Lower Brule Sioux Reservation was created by an Act of Congress on March 2, 1889, 25 Stat. 888, which divided the Great Sioux Reservation into several parts. App. 4a; DCO App. 25a. The reservation is located in northeastern Lyman County with a small portion in the southeastern corner of Stanley County. It is bounded on the northeast and east by the Missouri River. DCO App. 25a-26a.

The Lower Brule Reservation has been twice diminished, first by the Act of March 3, 1899, 30 Stat. 1362, and next by the Act of April 21, 1906, 34 Stat. 124. App. 4a; DCO App. 27a. The present reservation consists of approximately 235,800 acres. App. 4a, DCO App. 27a. Approximately 56,634 acres of this land constitute the fee lands which the Tribe wishes to exercise jurisdiction over by virtue of this litigation. *Id.*

The Tribe also wishes to exercise jurisdiction over nonmembers on an additional 22,296 acres of lands and waters acquired for construction of the Big Bend and Fort Randall Dams and their associated reservoirs. App. 5a; DCO App. 28a. The lands for the two reservoirs were acquired pursuant to the Flood Control Act of 1944 which provided that all flood control projects " 'shall be open to public use generally,' " and that there be " 'ready access to and exit from such water areas . . . for general public use.' " *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993) (quoting 16 U.S.C. § 460d); App. 71a. The *Bourland* court pointed out that the Flood Control "Act also clearly prohibits any 'use' of the lands 'which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated.' " *Id.* at 690 (quoting 16 U.S.C. § 460(d)); App. 71a.

The lands for the Fort Randall Dam and Lake Francis Case Reservoir were acquired pursuant to Pub. L. No. 85-923, 72 Stat. 1773 (Sept. 2, 1958), S.A.II.B.5[3], which provided that the Tribe maintained only the right to graze stock on the lands in question and a right of access for hunting and fishing. App. 5a; DCO App. 28a, 53a-54a. The taking for the Big Bend Dam and Lake Sharpe reservoir was pursuant to Pub. L. No. 87-734, 76 Stat. 698 (Oct. 3, 1962), S.A.II.B.4. App. 5a; DCO App. 28a, 54a. In this transaction, the United States acquired the "entire interest" of the Tribe, including gravel and any interest the Tribe "may have within the bed of the Missouri River" (but excluding oil, gas, and mineral interest). Further, the Tribe, as with Fort Randall, was allowed to exercise a grazing right and free "access for hunting and fishing." DCO App. 54a.

REASONS FOR DENYING THE PETITION

The Lower Brule Sioux Tribe presents four general arguments for granting the petition. An examination of the four tribal positions indicates that the lower courts correctly decided the issues presented to them by applying precedent established by this Court.

[3] The term "S.A." refers to the State's Appendix compiled in the Court of Appeals.

ARGUMENTS

I.

CERTIORARI NEED NOT BE GRANTED TO APPLY WELL ESTABLISHED LAW TO THE QUESTION OF WHETHER SOUTH DAKOTA MAY EXERCISE CIVIL REGULATORY JURISDICTION OVER NONMEMBERS WITHIN THE AREAS ACQUIRED FOR THE MISSOURI RIVER RESERVOIRS.

The question of whether the State of South Dakota may exercise civil regulatory jurisdiction over nonmembers on lands and waters acquired in fee by the United States for the Missouri River reservoirs adjoining the Lower Brule Reservation is well settled.

This analysis begins with the unremarkable proposition that the states have general civil regulatory authority over fish and game within their borders, barring a conflict with the Constitution or federal law. *See generally Geer v. Connecticut*, 161 U.S. 519, 528 (1896). *See also Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 288 (1977) (Rehnquist, J., concurring in part and dissenting in part); *Toomer v. Witsell*, 334 U.S. 385, 402 (1948); *Lacoste v. Department of Conservation*, 263 U.S. 545, 549 (1924). The question which arises, therefore, is whether that state authority has been "preempted by federal law," or whether the exercise of state authority infringes upon " 'the right of reservation Indians to make their own laws and be ruled by them.' " *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980). As *White Mountain Apache Tribe*, 448 U.S. at 143 holds, either of the barriers can be a "sufficient basis for holding state law inapplicable to activity undertaken on the reservation." This Court

has noted that when the State asserts authority over non-Indians engaging in activities on the reservation:

> we have examined the language of the relevant federal treaties and statutes in terms of both the broad policies that underlie them and the notions of sovereignty that have developed from historical traditions of tribal independence. This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

Id. at 144-145. The record demonstrates that the courts below correctly found state law not to be preempted.

The first critical indicator that Congress did not preempt the law of the state is found in the Flood Control Act of 1944, the generic authority under which the reservoirs adjoining the Lower Brule Reservation were built. As the court of appeals found:

> It is apparent from the language of the Flood Control Act of 1944 that Congress did not preempt state law. The Act provides: "No use of any area to which [the Flood Control Act] applies shall be permitted which is inconsistent with the laws for the protection of fish and game *of the State in which such area is situated.*" 16 U.S.C. § 460d.

App. 13a (emphasis by the Court). *See also* DCO App. 58a. Thus, the Flood Control Act, by forbidding activity "inconsistent" with state fish and game law, clearly *deferred to* state law and did not attempt to preempt it.

Furthermore, the two acts by which the United States acquired lands of the Tribe and its members to build the Fort Randall and Big Bend Reservoirs adjoining the Reservation likewise indicate a deference to state law. As the court of appeals pointed out:

> both the Fort Randall and Big Bend Taking Acts grant tribal members permission to hunt and fish within the taken areas, 'subject, however, to regulations governing the corresponding use by other citizens of the United States.' Fort Randall Taking Act, § 5; Big Bend Taking Act, § 10. This language recognizes that other regulations may impact the lands. *See Bourland III*, 508 U.S. at 691. In light of the fact that there are no comprehensive federal hunting and fishing regulations in effect for the taken areas, we agree with the district court's observation that this language indicates that Congress anticipated that the federal government would rely heavily on state regulation.

App. 13a; *see* DCO App. 58a.

Not only does the statutory authority unequivocally indicate that Congress intended to defer to, and not preempt, state law, the United States government has implicitly articulated that position. On September 15, 1986, for example, Colonel Steven West, the district engineer for the Corps of Engineers, wrote:

> [R]egulation of hunting and fishing on Corps project lands in South Dakota is a matter of State law. This was clearly the intent of Section 4 of the 1944 Flood Control Act. . . . As you know, the Corps has only proprietal jurisdiction over

> its project lands along the mainstem of the Missouri River in South Dakota. Such lands are subject to state civil and criminal jurisdiction.

App. 14a. Similarly, a representative of the Corps of Engineers informed Congress in 1987 that:

> Senator, it is my understanding that, in this instance, *we would rely on the State agencies for jurisdiction over the enforcement of laws on those areas*. The United States or the Corps of Engineers has no jurisdiction in terms of enforcement within the project. We rely on the State agencies. . . . We have jurisdiction over the land, but in terms of enforcing State game laws, we do not have any jurisdiction over State game laws.

DCO App. 60a (quoting U.S. Senate Hearing 100-500, Nov. 19, 1987) (emphasis added by the court) (testimony of John Velehradsky, Chief of the Planning Division of Missouri River Division, COE).

Finally, as the court of appeals pointed out, the rules of the Corps of Engineers published in the Code of Federal Regulations "likewise provide for application of state laws." App. 14a.

The weighing of the respective interests clearly favors state jurisdiction under *Bracker*. The state's interest in assuring that nonmembers are subjected to regulation only by a government in which they may participate is relevant as is the state interest in protection of its extensive investment of time and energy. DCO App. 50a. For example, after the reservoirs were closed, the State stocked between five and six million fry, fingerlings, and catchable fish in Lake Francis Case and between four and

five million fry, fingerlings, and catchable fish in Lake Sharpe. Ex. 207 at 3, 4; Ex. 385; Ex. 526 at 16-17; Ex. 527 at 15. *See also* S.A.II.A.1, 3, 5, 7, 9-12; II.B.1-3. The Tribe does not seriously argue here that it has the authority to regulate nonmembers in the area. Nor can it argue a history of extensive activity as to the Corps of Engineers lands. *See, e.g.*, S.A.II.A.3, ¶¶ 11-13; II.A.5, ¶¶ 10-11; II.A.7, ¶¶ 6, 7, 12-13; II.A.9, ¶¶ 16, 19. The federal interest in state regulation is clear from the studied deference of the federal statute and regulation to state law. Finally, we note that because the Tribe lacks the authority to regulate nonmembers in the area and the federal statutes defer to the state, it is in the joint interest of the Tribe and federal government that the State exercise its own jurisdiction to protect the natural resources at stake. *See* DCO App. 50a. The relevant principles of law thus overwhelmingly indicate that state law is not preempted.

The Tribe implicitly admits that it cannot overcome the foregoing argument and, instead, suggests that what actually occurred was that Congress unconstitutionally *granted* to the Corps authority to confer upon the state the power to regulate nonmembers on the taken area. *See* Petition For Certiorari, p.9. The action was unconstitutional, reasons the Tribe, as a violation of the "nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of government. *Touby v. United States*, 500 U.S. 160 (1991)." Petition at 10. The Tribe also suggests that the action of

Congress violated the Tenth Amendment because it commandeered the State of South Dakota "to enact and enforce a federal regulatory program." Petition at 12.

The Tribe's analysis is misplaced. Congress did not *grant* legislative authority to the states; instead, *Congress declined to preempt state law* as set forth above. We acknowledge, of course, that while certain language in the Court of Appeals' Opinion refers to a lack of preemption, other language states that the Corps of Engineers "delegated" authority to the State. *See, e.g.*, App. 14a. Read in context, however, this "delegation" language simply refers in an imprecise way to the lack of federal preemption.

In any event, the statutes actually demonstrate an intent not to preempt the authority of the State and not an intent to delegate authority to the State.[4] Of course, if the Court below incorrectly relied on a delegation theory, which we do not concede, it nonetheless came to the right result and a grant of certiorari is unnecessary to correct the decision. *See United States v. New York Telephone Company*, 434 U.S. 159, 166 (1977).

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[4] Petitioner's Tenth Amendment argument is thus essentially irrelevant because it is contingent upon the delegation theory. Furthermore, Petitioner's Tenth Amendment argument should be rejected because it was not properly raised below, *see Youakim v. Miller*, 425 U.S. 231, 233 (1976), and because the "delegation" theory upon which it premised contemplates a statutory construction which unnecessarily raises constitutional problems. *See United States v. X-Citement Video, Inc.*, ___ U.S. ___, 115 S.Ct. 464, 472 (1994).

II.

IN THE AREA OF HUNTING AND FISHING REGULATION, THIS COURT HAS ESTABLISHED THE NECESSARY ANALYSIS TO DETERMINE WHO REGULATES NONMEMBER ACTIVITIES WITHIN TAKEN AREAS OF THE LOWER BRULE SIOUX RESERVATION AND NO FURTHER CLARIFICATION IS NEEDED.

The Tribe argues that its Petition for Certiorari should be granted because this Court in *South Dakota v. Bourland*, 508 U.S. 679 (1993) did not determine whether tribes could regulate the terms and conditions of ingress and egress or whether tribes could regulate the impacts from the taken area onto trust lands or onto fee lands. Petition at 13. The Tribe urges this Court to accept certiorari so it can further define and clarify the two exceptions set out in *Montana v. United States*, 450 U.S. 544 (1981).

This Court has, however, sufficiently clarified and defined the two *Montana* exceptions. This is especially true in the area of hunting and fishing regulation.

Montana involved a dispute between the Crow Tribe and the State of Montana regarding the licensing and regulation of nonmember hunters and fishers within the Crow Reservation. The *Montana* court first analyzed the treaties between the United States and the Crow Tribe. Under the 1868 Fort Laramie Treaty, 15 Stat. 649, the Crow Tribe received a reservation which was "set apart for the absolute and undisturbed use and occupation of the Indians herein named," and prohibited unauthorized persons from passing over, settling upon, or residing within the reservation. *Montana*, 450 U.S. at 558.

> The treaty, therefore, obligated the United States to prohibit most non-Indians from residing on or passing through reservation lands used and occupied by the Tribe, and, thereby, arguably conferred upon the Tribe the authority to control fishing and hunting on those lands. But that authority could only extend to land on which the tribe exercises "absolute and undisturbed use and occupation." And it is clear that the quantity of such land was substantially reduced by the allotment and alienation of tribal lands as a result of the passage of the General Allotment Act of 1887, 24 Stat. 388, as amended, 25 U.S.C. § 331 et seq., and the Crow Allotment Act of 1920, 41 Stat. 751. If the 1868 treaty created tribal power to restrict or prohibit non-Indian hunting and fishing on the reservation, that power cannot apply to lands held in fee by non-Indians.

Id. at 558-59 (footnotes omitted). After determining that the Tribe lacked a treaty right to regulate nonmember hunting and fishing on non-Indian fee lands, this Court found that the Tribe lacked the authority to regulate the activities under its inherent sovereignty

> [s]ince regulation of hunting and fishing by nonmembers of a tribe on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations. . . .

Id. at 564 (footnote omitted). This Court then went on to develop what are commonly known as the two *Montana* exceptions.

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations,

> even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. (Citations omitted.) A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Id. at 565-66. This Court found that neither exception applied because non-Indian hunters and fishers on non-Indian fee lands did not enter into a consensual agreement with the Crow Tribe and nonmember hunting and fishing on non-Indian fee lands did not threaten the tribe's political or economic security so as to justify tribal regulation. *Id.* at 566. The two *Montana* exceptions were explicated by this Court's plurality decision in *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989).

South Dakota v. Bourland, 508 U.S. 679 (1993) further clarified *Montana* in a context which is virtually indistinguishable from the case now before this Court. In *Bourland*, this Court determined that the Cheyenne River Sioux Tribe lacked treaty authority to regulate nonmembers hunting and fishing on taken lands owned by the Corps of Engineers which were acquired for the construction of the Oahe Dam and Reservoir under the Flood Control Act of 1944, *id.* at 689-90, and remanded for determination of the application of the *Montana* exceptions.

On remand, the court of appeals affirmed the district court's decision that the Cheyenne River Sioux Tribe could not regulate the hunting and fishing activities of nonmembers on the Corps taken lands under *Montana. South Dakota v. Bourland*, 39 F.3d 868 (8th Cir. 1994).

Recently, this Court again defined and clarified the application of the two *Montana* exceptions. *Strate v. A-1 Contractors*, ___ U.S. ___, 117 S.Ct. 1404 (1997). "Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances." *Id.* at ___, 117 S.Ct. at 1409. This Court noted "that in certain circumstances, even where Congress has not expressly authorized it, tribal civil jurisdiction may encompass nonmembers" if a tribe shows one of the two *Montana* exceptions exist. *Id.*

> *Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions: The first exception relates to nonmembers who enter consensual relationships with the tribe or its members; the second concerns activity that directly affects the tribe's political integrity, economic security, health or welfare.

Id. at ___, 117 S.Ct. at 1409-10. This Court set forth a detailed analysis of the two *Montana* exceptions. In analyzing the second exception as applied to the case before it, this Court stated:

> Undoubtedly, those who drive carelessly on a public highway running through a reservation

> endanger all in the vicinity, and surely jeopardize the safety of tribal members. But if *Montana*'s second exception requires no more, the exception would severely shrink the rule.

Id. at 1415. This Court then analyzed previous decisions to illustrate when the second exception may apply, thus further defining and clarifying the second *Montana* exception.

Brendale, Bourland, and *Strate* have defined and clarified the scope of the two *Montana* exceptions, and the Tribe has not shown any inadequacy in the definitions. This is especially true concerning the regulation of hunting and fishing within a reservation area.

III.

ONCE THE LOWER BRULE SIOUX TRIBE LOSES THE RIGHT TO EXCLUDE OTHERS FROM A TRACT OF LAND, IT LOSES THE INCIDENTAL POWER TO REGULATE THE CONDUCT OF NONMEMBERS ON THAT TRACT.

A. The method of alienation of Indian trust land is unimportant.

The Tribe urges the granting of its Petition because "[t]he Supreme Court's review of the effects of allotted lands passing into deeded ownership will promote the administration of government within the Reservation" and argues that, since the diminished Lower Brule Sioux Reservation was never opened for non-Indian homesteading, its case may be distinguished from *Montana* and *Bourland*. Petition at 15.

This Court's decisions make it clear that the method of alienation is unimportant. Once a tribe loses the ability to exclude others from a tract of land, it also loses the lesser right to regulate the conduct of nonmembers on that land. *Montana v. United States*, 450 U.S. 544, 558-59 (1981); *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 408, 425 (1989); *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993); *Strate v. A-1 Contractors*, ___ U.S. ___, 117 S.Ct. 1404, 1414 (1997); *also see County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251, 253-54 (1992).

> *Montana* thus described a general rule that, absent a different congressional direction, Indian tribes lack civil authority over the conduct of nonmembers on non-Indian land within a reservation, subject to two exceptions[.]

Strate, ___ U.S. ___, 117 S.Ct. at 1409-10. The authority to regulate nonmember conduct, absent one of the two *Montana* exceptions, only extends to land on which the tribe exercises " 'absolute and undisturbed use and occupation.' " *Montana*, 450 U.S. at 559.

Petitioner argues that *Montana* and *Bourland* should not apply since the unallotted lands within the reservation were never declared surplus and opened to non-Indian homesteading. This Court's decisions clearly show that the method of alienation of tribal lands is unimportant. The only controlling factor is whether the tribe can exclude others from a tract of land as this Court has determined:

> *Montana* and *Brendale* establish that when an Indian tribe conveys ownership of its tribal lands to non-Indians, it loses any former right of

> absolute and exclusive use and occupation of the conveyed lands. The abrogation of this greater right, at least in the context of the type of area at issue in this case, implies the loss of regulatory jurisdiction over the use of the land by others. In taking tribal trust lands and other reservation lands for the Oahe Dam and Reservoir Project, and broadly opening up those lands for public use, Congress, through the Flood Control and Cheyenne River Acts eliminated the Tribe's power to exclude non-Indians from these lands, and with that the incidental regulatory jurisdiction formerly enjoyed by the Tribe.

Bourland, 508 U.S. at 689.

As *Bourland* points out, regardless of the method used, once the Tribe lost its treaty right of unimpeded use and occupation, it also lost the basis for tribal exercise of the lesser included power to regulate. *Id.* at 691. "Certainly, the power to regulate is of diminished practical use if it does not include the power to exclude: Regulatory authority goes hand in hand with the power to exclude." *Id.* at 691 n.11.

Even if a tract of land is trust land, the tribe may lose the right to regulate if it has lost the right to exclude others from that trust land. In *Strate*, this Court determined that a right-of-way the State of North Dakota acquired for a state highway over a stretch of trust land was "equivalent, for nonmember governance purposes, to alienated, non-Indian land." *Id.* at ___ U.S. ___, 117 S.Ct. at 1413 (footnote omitted). Because the right-of-way was open to the general public and the tribe had lost the ability to exclude others from it, this Court held that

Montana, and its progeny, governed the case. *Id.* at ___ U.S. ___, 117 S.Ct. at 1414.

As clearly demonstrated by the decisions of this Court, the method of alienation of former Indian lands is unimportant. The fact that the Lower Brule Reservation was never opened for non-Indian homesteading makes no difference to the outcome of this matter. As both of the courts below correctly pointed out, the controlling factor is the Tribe's loss of the ability to exclude others from the non-Indian fee lands and Corps of Engineers' taken lands and waters.

B. The fee lands and taken lands and waters within the Lower Brule Sioux Reservation are not "closed areas."

Petitioner argues that the lands within the Lower Brule Reservation should be considered a "closed area" and that Justice Stevens' opinion in *Brendale v. Confederated Tribes and Bands of the Yakima Nation*, 492 U.S. 426, 433 (1989) should control. Petition at 14. The Lower Brule Reservation, however, is nothing like the 807,000-acre closed area within the Yakima Reservation. The Tribe, for example, does not contend that it has established a "closed area" or restricted access to or movement through any part of the reservation; nor could it make such a contention. *See Brendale*, 492 U.S. at 438. *See generally* S.A.II.A.12.

Further, this Court has made it clear that the Corps of Engineers' project lands are not "closed areas."

> The District Court found that the taken area is not a "closed" or pristine area, and the Court of

> Appeals did not disturb that finding. We agree that the area at issue here has been broadly opened to the public.

Bourland, 508 U.S. at 689 n.9 (citation omitted). Finally, *Strate* does not make the *Montana* rule contingent on an "open-closed" distinction. This Court's decisions, as properly applied by the courts below, appropriately define how jurisdiction over the lands in question should be determined. Both the district court and court of appeals properly applied these decisions.

IV.

FEDERAL LAW FAVORS THE GRANT OF SUMMARY JUDGMENT IN APPROPRIATE CASES.

The Tribe argues that summary judgment is not appropriate "in cases involving the determination of jurisdiction in Indian country where jurisdiction is based upon the complex mix of relevant facts." Petition at 19. The Tribe cites no direct authority for this proposition.

This Court, in a trilogy of cases, has indicated the critical role of summary judgment in securing a determination of actions which is just, speedy, and inexpensive both with regard to the persons asserting claims and those disputing them. In *Celotex Corporation v. Catrett*, 477 U.S. 317, 327 (1986), this Court found:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action."

This Court's emphatic declaration of the increased value of summary judgment has arisen from the improvement in pleading practices, *id.* at 327, and in discovery, *see, id.* at 322; in view of these developments, this Court set a heavier burden on a party opposing summary judgment than it had recognized in prior cases.

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 598 (1986), this Court determined that summary judgment was appropriate if there is no "genuine issue for trial" in a factually complex antitrust, unfair competition, and illegal conspiracy case concerning the television receiver industry. Following the 1963 amendment to Rule 56(e), the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.' " *Id.* at 587 (quoting Advisory Committee's Note to 1963 Amendment of Fed. Rule Civ.Proc. 56(e), 28 U.S.C.App., p. 626).

One of the principal purposes of summary judgment is to isolate and dispose of factually unsupported claims. *Celotex Corp.*, 477 U.S. at 323-24. "[W]e think it should be interpreted in a way that allows it to accomplish this purpose." *Id.* at 324.

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element

> of the nonmoving party's case necessarily renders all other facts immaterial.

Id. at 322-23. Summary judgment, like motions to dismiss a complaint or strike a defense, is designed to prevent the unwarranted consumption of public and private resources. *Id.* at 327.

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Id. Summary judgment, in this case, has fulfilled that purpose.

When determining if summary judgment should be granted, the district court judge must determine if a genuine issue for trial exists. "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). The Tribe had to do more than merely show a dispute of facts. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. The Tribe could not demonstrate genuine issues of material facts which would have required this matter to go through a

lengthy trial process. Indeed, no such issue is identified for this Court. As both courts below pointed out, no genuine issue of material fact existed which would have required this matter to go to trial. App. 6a n.1; DCO App. 31a-32a.[5]

As demonstrated by this Court's trilogy of cases, summary judgment is proper in complex cases including cases involving jurisdictional disputes between a state and a tribe.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

MARK W. BARNETT
Attorney General
State of South Dakota
Counsel of Record

JOHN PATRICK GUHIN
Deputy Attorney General
CHARLES D. MCGUIGAN
Assistant Attorney General
500 E. Capitol Avenue
Pierre, South Dakota 57501-5070
Telephone: (605) 773-3215

[5] The Tribe does not allege that it has not had a fair opportunity to conduct proper discovery in this matter. In fact, as the court of appeals pointed out, both parties carried out extensive discovery prior to the filing of the State's Motion for Summary Judgment. App. 3a. *See Matsushita Electric Industrial Company v. Zenith Radio Corp.*, 475 U.S. 574, 250 n.5 (1986).